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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 19, ORIGINAL

EX PARTE: IN THE MATTER OF L. W. BALDWIN AND GUY A. THOMPSON, TRUSTEES, ET AL., PETITIONERS.

MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS AND FOR RULE TO SHOW CAUSE, AND PETITION FOR MANDAMUS

EDWARD J. WHITE,
FRANK ANDREWS,
ROBERT H. KELLEY,
Attorneys for Petitioners.

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Texas, Houston Division, that certain suit now pending in the District Court of Harris County, Sixty-First Judicial District of Texas, No. C-211,736 on the docket of said State Court, entitled "Tyrrell & Garth Investment Company v. Houston North Shore Railway Company, et al."; and (b) further directing the Clerk of said District Court of the United States to issue a writ of certiorari to said State Court, commanding it to send to said District Court of the United States the record and the proceedings in said suit, and to take and entertain jurisdiction of said suit.

Your petitioners further move that a rule be entered and issued, directing the Honorable Thomas M. Kennerly, United States District Judge for the Southern District of Texas, and the District Court of the United States for the Southern District of Texas, Houston Division, to show cause why a writ of mandamus should not issue against them in accordance with the prayer of said petition, and why the petitioners should not have such other and further relief in the premises as may be just and meet.

Dated December 4, 1933.

EDWARD J. WHITE,
FRANK ANDREWS,
ROBERT H. KELLEY,
Attorneys for Petitioners.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. ....., ORIGINAL

PETITION OF L. W. BALDWIN AND GUY A. THOMPSON, TRUSTEES, ET AL., FOR WRIT OF MANDAMUS

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, L. W. Baldwin and Guy A. Thompson, Trustees, The Beaumont, Sour Lake & Western Railway Company and Houston North Shore Railway Company, respectfully show:

I.

1. Your petitioners L. W. Baldwin and Guy A. Thompson are citizens and residents of the City and County of St. Louis, State of Missouri. Your petitioners, The Beaumont, Sour Lake & Western Railway Company and Houston North Shore Railway Company, are corporations, duly created, incorporated and existing under the laws of the State of Texas, and are citizens

of said State, and each has its principal office in the City of Houston, Harris County, Texas.

2. On the 31st day of March, 1933, Missouri Pacific Railroad Company, a Missouri corporation, filed in the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, in which it then had and for more than six months had maintained its principal operating office, a petition for reorganization under Section 77 of the Federal Act relating to Bankruptcy, the filing of which petition was duly approved by the Judge of said Court. Thereafter, on the 2nd day of May, 1933, Houston North Shore Railway Company and The Beaumont, Sour Lake & Western Railway Company (with certain other railroad companies), each being a corporation a majority of whose capital stock, having power to vote for the election of directors, was then owned indirectly, through an intervening medium, by said Missouri Pacific Railroad Company, filed in the same proceeding their petition for reorganization under said Section 77, the filing of which petition was duly approved on the same date by the Judge of said Court.

3. Upon the filing of said petition by Missouri Pacific Railroad Company, Debtor, the Honorable C. B. Faris, Judge of the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, duly entered an order of said Court by the terms of which the said debtor was authorized and directed, pending the further orders of said Court in the premises, to run, manage, maintain, operate and keep in proper condition and repair the railroads and property of said debtor, wherever situated, whether in the State of Missouri, in the Judicial District of said Court, or elsewhere, and to manage and conduct its business as a railroad

company. Said order conferred such further incidental powers as were necessary to carry forward the business of a common carrier by rail, such authority being made specifically subject to the supervision and control of said Court, and to such further orders as the Court might enter in said proceeding. By said order the debtor was given specific instructions as to payment of taxes due or to become due, payment of necessary expenses of operation, payment of certain classes of claims, and preparation of certain statements of account. The order closed with a provision that the Court reserved full right and jurisdiction to make, from time to time, such other orders as it might deem proper.

4. On May 2, 1933, the said Court, upon the filing of the said petition of The Beaumont, Sour Lake & Western Railway Company, Houston North Shore Railway Company and other railroad companies, entered its order providing that the said order theretofore entered by the Court in said proceedings on March 31, 1933, with reference to the operation of the railroad and other property of Missouri Pacific Railroad Company, the payment of taxes, expenses, certain claims and other items, and the exercise of other powers and privileges as therein set forth, should be extended and made applicable to The Beaumont, Sour Lake & Western Railway Company and Houston North Shore Railway Company, and all other debtor companies joining in the last mentioned petition. Said order of May 2, 1933, closed with a reservation by the Court of full right and jurisdiction to make, from time to time, such further orders as the Court might deem proper with reference to the operation of the properties of The Beaumont, Sour Lake & Western Railway Company, Debtor, and Houston North Shore Railway Company, Debtor, and with reference to any proposed

plan of reorganization, and reserving in general the right to make other orders, amplifying, extending, limiting or otherwise modifying said order of May 2, 1933.

5. Thereafter, by an order duly made and entered on the 22nd day of June, 1933, by the said District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, your petitioners L. W. Baldwin and Guy A. Thompson were duly appointed temporary trustees of all and singular the railroads, lands, properties, estates, rights and franchises of whatever character and wherever situated of The Beaumont, Sour Lake & Western Railway Company and Houston North Shore Railway Company and each of them. Said appointment, by the terms of said order became effective as of the beginning of business on July 1, 1933, provided for the execution and filing of bonds by petitioners L. W. Baldwin and Guy A. Thompson, as such trustees, and for a further hearing to be held on the 25th day of July to determine whether such appointment should be made permanent or should be terminated. The bonds so required by said order were duly made and filed with the Clerk of said Court, and your petitioners L. W. Baldwin and Guy A. Thompson took the required oath of office as such trustees. By the further order of said Court, duly made and entered on the 25th day of July, 1933, after the hearing provided for, the appointment of your said petitioners, as such trustees, was confirmed and approved and made permanent and your said petitioners were thereby appointed permanent trustees of all and singular the railroads, land, properties, estates, rights and franchises of whatever character and wherever situated of the said The Beaumont, Sour Lake & Western Railway Company and Houston North Shore Railway Company, and each of them, and by said order

it was expressly provided that your petitioners, as such trustees, should have all the rights, and, subject to the control of the Court and consistently with the provisions of Section 77 of Chapter VIII of the Act of Congress relating to bankruptcy, should exericse all of the powers of trustees appointed pursuant to Section 44 or any other section of the said Act of Congress relating to bankruptcy. By the terms of said order your petitioners, as such trustees, were authorized and directed to run, manage, maintain and operate the railroads and properties of the said The Beaumont, Sour Lake & Western Railway Company and Houston North Shore Railway Company, and each of them, wherever situated, and to manage and conduct the business of said railroad companies, respectively, and to exercise such sundry other powers according to law and subject to the supervision and control of said Court as the Court might direct by other orders entered in said cause.

6. By reason of the premises your petitioners allege that prior to the institution of the suit below described, to-wit: from the 2nd day of May, 1933, until and including the 30th day of June, 1933, petitioners, The Beaumont, Sour Lake & Western Railway Company and Houston North Shore Railway Company, became, and during the said period continued to be, in effect, agents and officers of the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri; that by virtue of the above described petitions and orders said The Beaumont, Sour Lake & Western Railway Company and Houston North Shore Railway Company lost their right and power to operate their railroad properties independently and that during said fifty-nine-day period they possessed the power to operate their respective properties only in such manner

as was or might be directed and permitted by the said United States District Court, subject to its orders, supervision, control and direction, and not in such manner as might otherwise have been prescribed by the officers and directors of said respective railroad companies. That on and after the 1st day of July, 1933, and prior to the institution of the suit hereinbelow described, your petitioners L. W. Baldwin and Guy A. Thompson became, and have ever since been and now are, the duly appointed, qualified and acting trustees of the said The Beaumont, Sour Lake & Western Railway Company, Debtor, and of Houston North Shore Railway Company, Debtor, and of their and each of their railroads, lands, properties, estates, rights and franchises, and are now and since the 1st day of July, 1933, have been officers of the said District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri; and as such trustees and such officers of Court they were, prior to the institution of the suit hereinbelow described, in possession and entitled to the possession of the lands, premises and properties described in plaintiff's petition in said suit.

II.

1. On the 7th day of August, 1933, Tyrrell & Garth Investment Company, a joint stock association, as plaintiff, filed its petition in the District Court of Harris County, Sixty-First Judicial District of Texas, in a suit numbered C-211,736 on the docket of said Court, wherein petitioners Houston North Shore Railway Company and The Beaumont, Sour Lake & Western Railway Company and one Harry K. Johnson were named as defendants. Thereafter, on October 2, 1933, said Tyrrell & Garth Investment Company filed in said Court, in

lieu of said original petition, its first amended original petition, wherein the same parties are named as plaintiff and defendants, except that petitioners L. W. Baldwin and Guy A. Thompson, in their capacity as trustees as hereinbefore alleged, were also named as additional defendants. In its said amended petition, said Tyrell & Garth Investment Company seeks, as against petitioners, to cancel and to have annulled, as clouds upon the plaintiff's alleged title to said lands, certain deeds, therein described, conveying an easement and right of way over certain lands in said amended petition described, due to the alleged failure of petitioners, as such officers of Court, to observe and comply with certain conditions alleged to be contained in said deeds, with respect to the operation of petitioners' trains. Plaintiff further prays, in the said amended petition, for an injunction permanently enjoining and restraining these petitioners, and each of them (including the trustee petitioners in their official capacity), from making further use of said lands for right of way purposes or for any other purpose whatsoever, and especially from using the same for the operation of trains, cars or coaches thereon, and as a railroad or interurban right of way. Plaintiff further seeks therein to recover from petitioners the sum of One Hundred Fifty Thousand Dollars ($150,000.00) as damages allegedly sustained as a result of the acts and omissions of petitioners, through depreciation of the value of its lands in the vicinity of the said right of way, and the sum of Ten Thousand Dollars ($10,000.00) from petitioners Houston North Shore Railway Company and The Beaumont, Sour Lake & Western Railway Company, and from defendant Johnson, as an alleged equitable diminution in the value of certain other lands in said petition described. Reference is here made to

said amended petition for a further statement of the allegations and prayers thereof and of the nature and objects of said suit.

2. There has not been as yet any trial or final hearing of said suit.

III.

1. Being desirous of having said suit removed for trial into the District Court of the United States for the Southern District of Texas, Houston Division, that being the judicial district and division in which said suit was and is so pending in said State Court, your petitioners, on the 19th day of October, 1933, conformably to the provisions of Section 76 of Title 28, United States Code, presented to the District Court of the United States for the Southern District of Texas, at Houston, which was then in session, their petition for removal and certiorari, a copy of which, marked "Exhibit 1" is hereto attached and is hereby referred to and made a part hereof as fully as though here set forth at length.

2. And at the same time your petitioners presented to the said Court an amendment of and supplement to the said petition for removal and certiorari, a copy of which, marked "Exhibit 2," is hereto attached and is hereby referred to and made a part hereof as fully as though here set forth at length.

3. And at the same time the said Tyrrell & Garth Investment Company, plaintiff in said suit, by its attorneys, submitted to said Court its reply to said petition for removal and certiorari, a copy of which, marked "Exhibit 3," is hereto attached and is hereby referred to and made a part hereof as fully as though here set forth at length.

4. A true copy of plaintiff's first amended original petition filed in said suit in said State Court will be found attached to said last mentioned reply and is hereby referred to in aid of the allegations of paragraph 1 of Section II hereof, with respect to the nature of and parties to the said suit and the relief sought therein by the plaintiff. There is also attached to said reply a copy of an order of partial dismissal, entered on motion of the plaintiff by said State Court in said suit, after counsel for plaintiff were advised that your petitioners intended to present their said petition for removal and certiorari to said United States District Court. The effect of said order of partial dismissal (to said copy whereof reference is here made) was to dismiss and withdraw the plaintiff's prayer for an injunction as against the trustee petitioners, leaving intact the entire remainder of said amended petition, and expressly reserving to said plaintiff the right hereafter to seek such injunction against the corporate petitioners when and if they shall be discharged from the jurisdiction and control of said United States District Court for the Eastern District of Missouri.

5. At the time of presenting to said District Court the pleadings and matters referred to above, to-wit: on October 19, 1933, said petition, supplemental and amended petition and reply, with all exhibits attached thereto, were delivered to and filed with the Clerk of said District Court, for the consideration and use and at the suggestion of the Judge, the Honorable T. M. Kennerly; but the said Clerk did not then place, and has not since placed, his file mark thereon.

6. That said suit has not yet been removed to, or entered on the docket of, the said District Court of the

United States for the Southern District of Texas; and no motion to remand the same to the said State Court has ever been filed in or acted upon by said District Court of the United States.

7. The Honorable Thomas M. Kennerly, Judge of the District Court of the United States for the Southern District of Texas, having heard the arguments of counsel and having considered briefs by them respectively filed, and having taken under advisement the matter so submitted to him as the Judge of said Court, on the said 19th day of October, 1933, did, on the 20th day of November, 1933, endorse upon said amendment of and supplement to said petition for removal and certiorari a certain order and direction in words and figures as follows, to-wit:

"Beaumont, Texas, November 20, 1933

"IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

"Tyrell & Garth Investment Company,
versus
Houston North Shore Railway Company, et al.

"The foregoing Petition for Removal and Certiorari and Exhibits attached and referred to, shows that the suit sought to be removed to this Court is not a suit in which Plaintiff seeks to hold L. W. Baldwin and Guy A. Thompson, Trustees, responsible in their own person and/or property, but only in their representative capacity. It is, therefore,

denied. See Ruff v. Gay, C. C. A. (5th), No. 7008, decided November 15, 1933.

(signed) T. M. Kennerly,
United States District Judge."

And the said Judge thereupon returned to counsel for petitioners, and such counsel now hold, the said petition, supplemental and amended petition and reply.

8. That thereby said United States District Court and the Judge thereof refused to take or entertain jurisdiction of said suit; and refused to order that said suit, conformably to the provisions and requirements of Section 76 of Title 28, United States Code, be removed for trial from said State Court into the said District Court of the United States for the Southern District of Texas; and refused to cause said petitions and reply to be endorsed as filed and to be retained by the Clerk of said Court; and refused to issue and cause to be issued, conformably to said statute, a writ of certiorari to said State Court requiring it to send to said District Court of the United States the record and the proceedings in said suit, notwithstanding the fact that your petitioners, and each of them, are plainly entitled to such an order and to such writ and to such action, by virtue of said statute.

WHEREFORE, your petitioners, being without remedy other than sought herein, pray that a writ of mandamus may issue out of this Honorable Court directed to the said United States District Court for the Southern District of Texas and to the Honorable Thomas M. Kennerly, the Judge of said Court, commanding them and each of them to take and entertain jurisdiction of said suit; to enter an order pursuant to Section 76 of Title 28, United States Code, directing that there be removed

into, for trial in, the said District Court of the United States for the Southern District of Texas, Houston Division, that certain suit now pending in the District Court of Harris County, Sixty-First Judicial District of Texas, No. C-211,736 on the docket of said State Court, entitled "Tyrrell & Garth Investment Company v. Houston North Shore Railway Company, et al.," and further directing the Clerk of said District Court of the United States to receive, file and hold said petitions and reply and to issue a writ of certiorari to said State Court commanding it to send to said District Court of the United States the record and the proceedings in said suit; and to do and perform all such other acts and things as may be necessary and appropriate in the premises.
Dated December 4, 1933.

EDWARD J. WHITE,
FRANK ANDREWS,
ROBERT H. KELLEY,
Attorneys for Petitioners.

UNITED STATES OF AMERICA
THE STATE OF TEXAS
COUNTY OF HARRIS

ROBERT H. KELLEY, being first duly sworn, deposes and says that he is one of the attorneys for the petitioners named in the foregoing petition; that he has read the said petition and believes the same to be true; that said petitioning trustees are absent from and are non-residents of the County of Harris and State of Texas, and affiant makes this affidavit for the reason that said petitioners are absent from and are non-residents of said County of Harris in which said suit is brought, and as General Attorney of the corporate petitioners named

above, and for the further reason that as attorney for the defendants in said suit, he is familiar with the facts relating thereto.

ROBERT H. KELLEY,

SWORN TO AND SUBSCRIBED before me by Robert H. Kelley this 1st day of December, A. D. 1933.

(Notarial Seal)

VIRGINIA RATLIFF,
Notary Public in and for
Harris County, Texas.

Exhibit 1

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTICT OF TEXAS, HOUSTON DIVISION

Tyrrell & Garth Investment Company, Plaintiff versus Houston North Shore Railway Company, et al., Defendants	In Equity No.....

PETITION FOR REMOVAL AND CERTIORARI

To the Honorable District Court of the United States for the Southern District of Texas, Holding Sessions at Houston:

Come now L. W. Baldwin, Guy A. Thompson, Houston North Shore Railway Company, and The Beaumont, Sour Lake & Western Railway Company, herein called petitioners, and respectfully represent:

I.

On the 7th day of August, A. D. 1933, Tyrrell & Garth Investment Company, a joint stock association, filed a petition in the District Court of Harris County, Texas, 61st Judicial District, in a suit numbered C-211,736 on the docket of said court, wherein Tyrrell & Garth Investment Company was named as plaintiff, and Houston North Shore Railway Company, a corporation, and The Beaumont, Sour Lake & Western Railway Company, a corporation, and Harry K. John-

son were named as defendants. Thereafter, on October 2, 1933, said Tyrrell & Garth Investment Company filed in said court its first amended original petition, wherein the same parties are named as plaintiff and defendants, except that your petitioners, L. W. Baldwin and Guy A. Thompson, Trustees as hereinafter alleged, were also named as additional defendants. In its said amended petition Tyrrell & Garth Investment Company, plaintiff, seeks, as against petitioners, to cancel and annul certain deeds therein specified conveying an easement and right-of-way over certain lands in said petition described, due to the alleged failure of petitioners to observe and comply with certain alleged conditions in said deeds contained, with respect to the operation of their trains. Plaintiff further prays in the said amended petition for an injunction, permanently enjoining and restraining these petitioners and each of them, (including the Trustee petitioners in their official capacity), from making further use of said lands for right-of-way purposes or for any other purpose whatsoever, and especially from using the same for the operation of trains, cars, or coaches thereon, and as a railroad or interurban right-of-way. Plaintiff further seeks therein to recover from petitioners the sum of One Hundred Fifty Thousand ($150,000.00) Dollars as damages allegedly sustained as a result of the acts and omissions of petitioners, through depreciation of the value of its lands in the vicinity of the said right-of-way, and the sum of Ten Thousand ($10,000.00) Dollars from petitioners Houston North Shore Railway Company and The Beaumont, Sour Lake & Western Railway Company, and from defendant Johnson as an alleged equitable diminution from the value of certain other lands in said petition

described. Reference is here made to said amended petition for a further statement of the allegations and prayers thereof and of the nature and objects of said suit.

II.

There has not been as yet any trial or final hearing of said suit.

III.

On the 31st day of March, 1933, Missouri Pacific Railroad Company, a Missouri corporation, filed in the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, a petition for reorganization under Section 77 of the Federal Act relating to Bankruptcy, the filing of which was duly approved by the Judge of said Court. Thereafter, on the 2nd day of May, 1933, Houston North Shore Railway Company and The Beaumont, Sour Lake & Western Railway Company (with certain other railroad companies) each a corporation a majority of whose capital stock, having power to vote for the election of directors, was then owned, indirectly through an intervening medium, by Missouri Pacific Railroad Company, filed in the same proceeding their petition for reorganization, which, on the same date, was duly approved by the Judge of said court.

IV.

Upon the filing of the first named petition by Missouri Pacific Railroad Company, Debtor, the Hon. C. B. Faris, Judge of the United States District Court for the Eastern Division of the Eastern Judicial District of

Missouri, duly entered an order by the terms of which the debtor (Missouri Pacific Railroad Company) was authorized and directed, pending further order of said Court in the premises, to run, manage, maintain, operate and keep in proper condition and repair the railroads and property of said debtor, wherever situated, whether in the State of Missouri in the Judicial District of said Court or elsewhere, and to manage and conduct its business as a railroad company; and said order conferred such further incidental powers as were necessary to carry forward the business of a common carrier by rail, such authority being made specifically subject to the supervision and control of said Court, and to such further orders as the court might enter in said proceeding. By the terms of said order the debtor was given specific instructions as to payment of taxes due or to become due, the payment of necessary expenses of operation, the payment of certain classes of claims, and the preparation of certain statements of account. The order closed with a stipulation that the Court reserved full right and jurisdiction to make, from time to time, such other orders as the Court might deem proper.

V.

On May 2nd, 1933, the said Court, upon the filing of the petition of The Beaumont, Sour Lake & Western Railway Company and Houston North Shore Railway Company, and other railroad companies, entered its order providing that the order theretofore entered by the Court in said proceedings on March 31st, 1933, with reference to the operation of the railroad and other property of Missouri Pacific Railroad Company, the payment of taxes, expenses, certain claims and other items,

and the exercise of other powers and privileges as therein set forth, should be extended to and made applicable to The Beaumont, Sour Lake & Western Railway Company, and Houston North Shore Railway Company, and all other debtor companies, joining in the petition filed on said date. Said last named order closed with a reservation by the Court of full right and jurisdiction to make, from time to time, such further orders as the Court might deem proper with reference to the operation of the properties of The Beaumont, Sour Lake & Western Railway Company, Debtor, and Houston North Shore Railway Company, Debtor, and with reference to any proposed plan of reorganization, and reserving in general the right to make other orders, amplifying, extending, limiting, or otherwise modifying said order of May 2nd, 1933.

VI.

Thereafter, by an order duly made and entered on the 22nd day of June, 1933, by the said District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, your petitioners, L. W. Baldwin and Guy A. Thompson, were duly appointed temporary trustees of all and singular the railroads, lands, properties, estates, rights and franchises of whatever character and wherever situated of The Beaumont, Sour Lake & Western Railway Company and Houston North Shore Railway Company. Said appointment, by the terms of said order, became effective as of the beginning of business on July 1st, 1933, provided for the execution and filing of bonds by your petitioners, L. W. Baldwin and Guy A. Thompson as such trustees, and for a further hearing to be held on the 25th day of July

to determine whether such appointment should be made permanent or should be terminated. The bonds so required by said order were duly made and filed with the Clerk of said Court, and your petitioners L. W. Baldwin and Guy A. Thompson, took the required oath of office as such trustees. By the further order of said Court, duly made and entered on the 25th day of July, 1933, after the hearing so provided for, the appointment of your petitioners, as such trustees, was confiirmed and approved and made permanent and your petitioners were appointed permanent trustees of all and singular the railroads, lands, properties, estates, rights, and franchises of whatever character and wherever situated of the said The Beaumont, Sour Lake & Western Railway Company, and Houston North Shore Railway Company, and by said order it was expressly provided that your petitioners, as such trustees, should have all rights and, subject to the control of the Court and consistently with the provisions of Section 77 of Chapter VIII of the Act of Congress relating to bankruptcy, should exercise all of the powers of Trustees appointed pursuant to Section 44 or any other section of the Act of Congress relating to bankruptcy. By the terms of said order your petitioners, as such Trustees, were authorized and directed to run, manage, maintain and operate the railroads and properties of the said The Beaumont, Sour Lake & Western Railway Company and Houston North Shore Railway Company, wherever situated, and to manage and conduct the business of said railroad companies, and to exercise such sundry other powers according to law and subject to the supervision and control of said Court as the Court might direct by other orders entered in said cause.

VII.

By reason of the premises your petitioners say that prior to the institution of this suit, to-wit, from the 2nd day of May, 1933, until and including the 30th day of June, 1933, petitioners The Beaumont, Sour Lake & Western Railway Company and Houston North Shore Railway Company became and during the period named continued to be, in effect, agents and officers of the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri; that by virtue of said orders said The Beaumont, Sour Lake & Western Railway Company and Houston North Shore Railway Company lost their power to operate their railroad properties independently, and that they possessed the power to operate said properties only in such fashion as was directed and permitted by the said United States District Court, subject to its orders, supervision, control and direction, and not in such manner as might otherwise be prescribed by the officers and directors of said railroad companies. That on and after the first day of July, 1933, and prior to the institution of the suit first above described, your petitioners, L. W. Baldwin and Guy A. Thompson, became and have ever since been, and now are, the duly appointed, qualified and acting trustees of the said The Beaumont, Sour Lake & Western Railway Company, Debtor, and Houston North Shore Railway Company, Debtor, and of their, and each of their, railroads, lands, properties, estates, rights and franchises, and are now, and since the 1st day of July, 1933, have been, officers of the said District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, and as such trustees, and such officers of Court, they were, prior to the institution of the suit first above described, in possession and entitled

to the possession of the lands, premises and properties described in plaintiff's petition in said suit.

VIII.

Wherefore, all of your petitioners aver that the said suit so filed in the District Court of Harris County, Texas, is a civil suit commenced in a Court of the State of Texas against your petitioners, and each of them, as officers of a Court of the United States, to-wit, the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri and is a suit for and on account of acts done under color of the office of your petitioners, and each of them, and in the performance of the duties imposed upon your petitioners, and each of them, as such officers of Court; and the necessary effect of the institution and prosecution of said suit in said State Court is, and will be, to materially interfere with and obstruct the jurisdiction and powers of the said District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri with respect to the properties and assets of said debtors, The Beaumont, Sour Lake & Western Railway Company and Houston North Shore Railway Company, and each of them.

WHEREFORE, premises considered, your petitioners, and each of them, pray that said suit, to-wit, No. C-211,736 on the docket of the District Court of Harris County, Texas, pursuant to Section 76 of Title 28 of the United States Code, shall be removed for trial into this Honorable Court, being the District Court of the Judicial District of the United States in which said cause is now pending, and, this Honorable Court being now in session, your petitioners pray that it issue a writ of certiorari to the said State Court requiring it to send to this

Honorable Court the record and the proceedings in said suit, and for such other orders and relief as your petitioners may be entitled to in the premises.

Respectfully submitted,

HOUSTON NORTH SHORE RAILWAY COMPANY,
THE BEAUMONT, SOUR LAKE & WESTERN RAILWAY COMPANY,
L. W. BALDWIN,
GUY A. THOMPSON,

By ANDREWS, STREETMAN, LOGUE & MOBLEY,
HARRY R. JONES,
ROBERT H. KELLEY,
Their Attorneys.

THE STATE OF TEXAS }
COUNTY OF HARRIS }

Before me, the undersigned authority, on this day personally appeared R. H. KELLEY, who being duly sworn deposes and says that he is a member of the firm of Andrews, Streetman, Logue & Mobley, General Attorneys for the above named petitioners; that he has read over the foregoing petition and that the facts therein stated are, within his knowledge, true, except such as are therein stated on information and belief, and them he verily believes to be true. Deponent further says, that he is an attorney duly licensed and qualified to practice law in the District Court of the United States for the Southern District of Texas; that as counsel for the petitioners he has examined the proceedings against them and carefully inquired into all the matters set forth in the foregoing petition and that he believes them to be true. Deponent says also that he is duly authorized

by the petitioners to execute, file and verify this petition on behalf of the petitioners.

R. H. KELLEY,

Sworn to and subscribed before me, this the 13th day of October, A. D. 1933.

(NOTARIAL SEAL) VIRGINIA RATLIFF,
Notary Public in and for
Harris County, Texas.

Exhibit 2

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION.

TYRRELL & GARTH INVESTMENT COMPANY, Plaintiff v. HOUSTON NORTH SHORE RAILWAY COMPANY, ET AL., Defendants	In Equity No.....

Now come the petitioners in the above matter, L. W. Baldwin, Guy A. Thompson, Houston North Shore Railway Company and the Beaumont, Sour Lake & Western Railway Company, and in view of the objections contained in paragraphs I and II of the answer of Tyrrell & Garth Investment Company to the petitioners' petition for removal and certiorari, file the following amendment of and supplement to said petition for removal and certiorari, to-wit:

1—A copy of plaintiff's amended petition filed in the District Court of Harris County, Texas, referred to in paragraph I of said petition for removal, is attached to the said answer of Tyrrell & Garth Investment Company and is hereby referred to and made a part hereof.

2—There is attached hereto and made a part hereof, marked Exhibit "A", a true copy of the petition of Missouri Pacific Railroad Company for reorganization referred to in paragraph III of said petition for removal.

3—There is attached hereto and made a part hereof,

marked Exhibit "B," a true copy of the order referred to in paragraph IV of said petition for removal.

4—There is attached hereto, marked Exhibit "C" and made a part hereof, a true copy of the petition for reorganization of these petitioners and certain other railroad companies also referred to in paragraph III of said petition for removal.

5—There is attached hereto and made a part hereof, marked Exhibit "D", a true copy of the order referred to in paragraph V of said petition for removal.

6—There are attached hereto and made a part hereof, marked respectively Exhibits "E" and "F", copies of the orders of appointment referred to in paragraph VI of said petition for removal.

Petitioners pray that this amendment and the attachments hereto shall be deemed and treated as a part of their petition herein for removal and certiorari.

ANDREWS, STREETMAN, LOGUE & MOBLEY,
HARRY R. JONES,
ROBERT H. KELLEY,
Attorneys for Petitioners.

SWORN TO AND SUBSCRIBED before me by Robert H. Kelley, this 19th day of October, A. D. 1933.

(NOTARIAL SEAL)

VIRGINIA RATLIFF,
Notary Public in and for
Harris County, Texas.

Exhibit A

(Petition No. 1)

In the

DISTRICT COURT OF THE UNITED STATES
Eastern Division, Eastern Judicial District of Missouri

In the Matter of
MISSOURI PACIFIC RAILROAD COMPANY,
Debtor. } No. 6935.

PETITION

To the Honorable the Judges of the District Court of the United States for the Eastern Division, Eastern Judicial District of Missouri:

The petition of Missouri Pacific Railroad Company, a railroad corporation organized and existing under the laws of the State of Missouri, hereinafter referred to as the Debtor, respectfully represents:

FIRST: That the Debtor is a railroad corporation duly organized and existing under the laws of the State of Missouri, and a citizen and resident of said

State, and is a common carrier by railroad engaged in the transportation of persons and property in interstate commerce in the States of Missouri, Arkansas, Colorado, Illinois, Kansas, Louisiana and Oklahoma, and is not a street, suburban or interurban electric railway; that during the six months' period immediately preceding the filing of this petition the Debtor has had, and now has, its principal operating office in the City of St. Louis, Missouri, in the Eastern Division, Eastern Judicial District of Missouri.

SECOND: That there will become due on April 1, 1933, and within thirty days thereafter, the following:

Interest on obligations of the Debtor, due April 1, 1933, aggregating	$ 1,110,411.92
Taxes on property of the Debtor which will become subject to a penalty if not paid by April 10, 1933 (approximately)	1,295,000.00
Principal of, and interest on, obligations of the Debtor, or obligations which constitute a lien upon its property due April 30/May 1, 1933	38,183,918.86
Total	$40,589,330.78

That the Debtor is without funds to pay and discharge the aforesaid obligations as they mature, and on information and belief alleges that it has no means of borrowing or otherwise procuring such funds; that it is unable to meet its debts as they mature, and desires to effect a plan of reorganization, pursuant to

Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy.

THIRD: That a copy of this petition is this day being filed with the Interstate Commerce Commission.

FOURTH: That the filing of this petition was duly authorized by the Debtor by resolution of the Executive Committee of the Board of Directors of the Debtor, adopted at a meeting thereof duly held on the 31st day of March, 1933.

Wherefore, your petitioner prays that an order may be entered approving this petition as properly filed under said Section 77, and that it be granted all other and further relief to which it may be entitled.

MISSOURI PACIFIC RAILROAD COMPANY,
By L. W. BALDWIN,
President.

HERBERT FITZPATRICK,
JOHN P. MURPHY,
PAUL J. BICKEL,
EDW. J. WHITE,
Attorneys for Debtor,
13th & Olive Sts.,
St. Louis, Missouri.

United States of America,
Eastern Judicial District of Missouri, } ss:
City of St. Louis, Missouri.

L. W. Baldwin, being duly sworn, deposes and says that he is an officer, to-wit, the President, of Missouri Pacific Railroad Company, a corporation, the petitioning Debtor mentioned and described in the foregoing petition; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes them to be true.

L. W. Baldwin.

Subscribed and Sworn to before me this 31st day of March, 1933.

Geo. W. Collins,
(Notarial Seal) Notary Public.

My commission expires June 27, 1933.
Filed March 31st, 1933. Jas. J. O'Connor, Clerk.

Exhibit B

(Order No. 1)

In the

DISTRICT COURT OF THE UNITED STATES,
Eastern Division, Eastern Judicial District of Missouri

In the Matter of
MISSOURI PACIFIC RAILROAD COMPANY,
Debtor. } No. 6935.

ORDER

Upon due consideration of the petition of Missouri Pacific Railroad Company, the above named Debtor, verified March 31, 1933, and filed herein this day, stating that such Debtor is unable to meet its debts as they mature and that it desires to effect a plan of reorganization in accordance with Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy, and the Court being satisfied that such petition complies with said Section and has been filed in good faith, it is Ordered:

(1) That said petition be, and it hereby is, approved as properly filed under Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy.

(2) That the Debtor be, and it hereby is, authorized and directed, pending further order of this Court in the premises, to run, manage, maintain, operate and

keep in proper condition and repair the railroads and property of the Debtor, wherever situated, whether in this state, judicial circuit, or elsewhere, and to manage and conduct its business as a railroad company, and to this end to exercise its authority and franchises and discharge all public duties obligatory upon it, and to employ and discharge and fix the compensation of all officers, attorneys, managers, superintendents, agents and employees, to collect and receive the income, rents, revenues, tolls, issues and profits of said property, to collect all outstanding accounts and all dividends and interest on securities belonging to it, to make such advances to its subsidiary corporations as are necessary to protect the Debtor's interest therein, all in the same manner that it would be entitled and bound to do in its own right, and to the extent necessary to protect and preserve the property of the Debtor to make and pay for additions and betterments to the railroads and property of the Debtor, all according to law, and subject to such supervision and control by the Court as the Court may exercise by further orders entered herein. The Debtor is authorized in its discretion from time to time until further order of this Court out of funds now or hereafter coming into its hands to pay:

(a) All taxes and assessments due or to become due upon the property of the Debtor.

(b) All necessary expenses of operating the railroads and conducting the business of the Debtor, including among other expenses the wages, salaries and compensations of all officers, attorneys, counsel, managers, superintendents, agents or employees retained by the Debtor, ticket,

traffic, car mileage and car per diem balances, interline accounts, freight and overcharge claims and amounts for car and equipment repairs as may become due to connecting or other railroad companies or other common carriers, including all sums now due or which may hereafter become due to other persons or corporations for the occupation or use, jointly or otherwise, of buildings, depots, terminals, tracks, side tracks, yards, warehouses, shops, bridges and other railroad facilities, and such sums as may be necessary to comply with the obligations of the Debtor under contracts by virtue of which said occupation or use may now or hereafter be enjoyed (but such payments shall not constitute affirmations of said contracts, or of any of them):

(c) The following claims incurred by the Debtor within six months preceding the date of this order, to-wit: Wages, salaries, fees and other charges due and payable for services rendered to the Debtor in the usual and customary operation of its properties and the conduct of its current business, unpaid material and supply accounts incurred in the operation of said properties, unpaid and outstanding pay checks and wage checks representing labor actually performed for the Debtor, and unpaid ticket, traffic, car mileage and car per diem balances, interline accounts, freight and overcharge claims and amounts for car and equipment repairs incurred by the Debtor;

(d) The cost of maintaining the corporate existence of the Debtor, including the necessary ex-

penses of the preservation of records, and the registration and transfer of its stocks and bonds and trustee's charges under indentures under which securities of the Debtor have been issued.

(3) The Debtor shall close its present books of account as of the close of business on March 31, 1933. The Debtor shall open new books of account as of the opening of business on April 1, 1933, and cause to be kept therein due and proper accounts of the earnings, expenses, receipts and disbursements of the Debtor, and shall preserve proper vouchers for all payments made on account thereof, and shall deposit the moneys coming into its hands in such of the banks in which funds of the Debtor are presently deposited as shall be selected by the Debtor, or in such other bank or banks as shall be selected by and approved by this Court.

(4) Within forty days after the entry of this order, the Debtor shall file with the Clerk of this Court a statement of the Assets and Liabilities of the Debtor as of the close of business on March 31, 1933, and on or before the last business day of each calendar month thereafter shall file with said Clerk a statement of the Assets and Liabilities of the Debtor as of the close of business on the last day of the preceding month together with a summary statement of the revenues and expenses of the Debtor of the preceding calendar month. All such statements shall be certified as correct by the chief accounting officer of the Debtor.

(5) This Court reserves full right and jurisdiction to make from time to time such orders as the Court

shall deem proper, appointing a trustee or trustees of all of said Debtor's property and estate, with all the title and powers of such trustee or trustees under and subject to the provisions of the Acts of Congress relating to bankruptcy, including the power to operate the business of said Debtor, fixing the time within which any plan of reorganization shall be proposed, accepted and confirmed, requiring the Debtor to file such schedule and submit such information as may be necessary to disclose the conduct of the Debtor's affairs and the fairness of any proposed plan, fixing a reasonable time within which claims and interests of creditors and stockholders may be filed or evidenced and allowed, and the division of creditors and stockholders into classes according to the nature of their respective claims and interests, and in general such orders amplifying, extending, limiting or otherwise modifying this order as to the Court may at any time seem proper.

C. B. FARIS,
District Judge.

Dated March 31, 1933.
Filed March 31st, 1933. Jas. J. O'Connor, Clerk.

Exhibit C.

(Petition No. 11.)

In the

DISTRICT COURT OF THE UNITED STATES,
Eastern Division, Eastern Judicial District of Missouri

In the Matter of MISSOURI PACIFIC RAILROAD COMPANY, Debtor.	No. 6935. In Proceedings for the Reorganization of a Railroad.

PETITION

Of Missouri Pacific Railroad Corporation in Nebraska et al.

To the Honorable the Judges of the District Court of the United States for the Eastern Division, Eastern Judicial District of Missouri:

The petition of: Missouri Pacific Railroad Corporation in Nebraska; The Beaumont, Sour Lake & Western Railway Company; The St. Louis, Brownsville and Mexico Railway Company; San Antonio, Uvalde & Gulf Railroad Company; and Houston North Shore Railway Company, Debtors, respectfully represents:

First: That Missouri Pacific Railroad Company, Debtor, a railroad corporation duly organized and existing under the laws of the State of Missouri, owns directly all of the capital stock, having power to vote for the election of directors of Missouri Pacific Railroad Corporation in Nebraska, Debtor, a railroad corporation duly organized and existing under the laws

of the State of Delaware, and a common carrier by railroad engaged in the transportation of persons and property in interstate commerce in the State of Nebraska.

Second: That Missouri Pacific Railroad Company, Debtor, owns approximately 94 per cent of the capital stock having power to vote for the election of directors of New Orleans, Texas and Mexico Railway Company, Debtor, a railroad corporation duly organized and existing under the laws of the State of Louisiana; and that said New Orleans, Texas and Mexico Railway Company, Debtor, owns directly all of the capital stock having power to vote for the election of directors of the following corporations, with the result that Missouri Pacific Railroad Company, Debtor, owns indirectly, through an intervening medium, more than a majority of the capital stock having power to vote for the election of directors of said corporations, namely:

The Beaumont, Sour Lake and Western Railway Company, The St. Louis, Brownsville and Mexico Railway Company, San Antonio, Uvalde and Gulf Railroad and Houston North Shore Railway Company, Debtors, all of which are railroad corporations duly organized and existing under the laws of the State of Texas, and common carriers by railroad engaged in, or whose property is operated in, the transportation of persons and property in interstate commerce in the State of Texas.

Third: That heretofore on March 31, 1933, said Missouri Pacific Railroad Company, Debtor, filed in this Court in the above entitled proceeding, a petition stating that it is unable to meet its debts as they mature and that it desires to effect a plan of reorganiza-

tion pursuant to Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy; that on March 31, 1933, this Court entered an order herein approving said petition as properly filed under said Section 77.

Fourth: That each of the Debtors joining in this petition is without sufficient funds to pay and discharge its obligations, and is unable to meet its debts as they mature; and each desires to effect a plan of reorganization in connection with, or as a part of, the plan of reorganization of Missouri Pacific Railroad Company referred to in said petition of that Company, pursuant to Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy.

Fifth: That a copy of this petition will forthwith be filed with the Interstate Commerce Commission.

Sixth: That owing to the large number of creditors of the Debtors joining in this petition and the great amount of clerical and other labor required to make complete lists of creditors and other information required by clause (c) of Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy, it is not practicable to prepare said lists within fifteen days and that for that reason the Debtors desire an extension of said time.

Seventh: That the filing of this petition by the Debtors joining herein was duly authorized by said Debtors by resolutions of their respective Boards of Directors or the respective Executive Committees of their Boards of Directors, thereunto duly authorized.

Wherefore, the Debtors hereinabove mentioned pray that an order may be entered herein approving this

petition as properly filed by each of said Debtors under said Section 77 and that they may each be allowed to effect a plan of reorganization in connection with, or as a part of, the plan of reorganization of Missouri Pacific Railroad Company, referred to in said petition of said Debtor, that the time to prepare the lists of bondholders, creditors and stockholders of the Debtors joining in this petition be extended to June 15, 1933, and that the Court will enter and appropriate order granting to all of the Debtors who are parties to this proceeding such rights and powers as may be requisite for the carrying on of their business and the preservation of their properties, and that all of the Debtors be granted all other and further relief to which they may be entitled.

MISSOURI PACIFIC RAILROAD CORPORATION IN NEBRASKA,
THE BEAUMONT, SOUR LAKE & WESTERN RAILWAY COMPANY,
THE ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY,
SAN ANTONIO, UVALDE AND GULF RAILROAD COMPANY,
HOUSTON NORTH SHORE RAILWAY COMPANY,

L. W. BALDWIN,
President.

PAUL J. BICKEL,
THOS. T. RAILEY,
EDW. J. WHITE,
Attorneys for said Debtors.
13th and Olive Streets,
St. Louis, Missouri.

United States of America,
Eastern Judicial District of Missouri } ss.
City of St. Louis, Missouri.

L. W. Baldwin, being duly sworn, deposes and says that he is an officer, to wit, the President of Missouri Pacific Railroad Corporation in Nebraska, The Beaumont, Sour Lake & Western Railway Company, The St. Louis, Brownsville and Mexico Railway Company, San Antonio, Uvalde & Gulf Railroad Company and Houston North Shore Railway Company, corporations, petitioning Debtors mentioned and described in the foregoing petition; that he has read the foregoing petition and knows the contents thereof, and facts stated therein with respect to said corporations are true.

L. W. BALDWIN.

Subscribed and sworn to before me this 1st day of May, 1933.

GEO. W. COLLINS,
(Seal) Notary Public.

My commission expires June 27th, 1933.
Filed May 2, 1933. Jas. J. O'Connor, Clerk.

Exhibit D.

(Order No. 11)

In the

DISTRICT COURT OF THE UNITED STATES,
Eastern Division, Eastern Judicial District of Missouri

In the Matter of MISSOURI PACIFIC RAILROAD COMPANY, Debtor.	No. 6935. In Proceedings for the Reorganization of a Railroad.

ORDER

On Petition of Missouri Pacific Railroad Corporation in Nebraska et al.

Upon due consideration of the petition of: Missouri Pacific Railroad Corporation in Nebraska; The Beaumont, Sour Lake & Western Railway Company; St. Louis, Brownsville and Mexico Railway Company; San Antonio, Uvalde & Gulf Railroad Company, and Houston North Shore Railway Company, Debtors, verified May 1, 1933, and filed herein under Section 77 of Chapter VIII of Acts of Congress relating to bankruptcy, showing that more than a majority of the capital stock of the Debtors joining in said petition is owned by Missouri Pacific Railroad Company, Debtor, either directly or indirectly through an intervening medium, and showing further that the Debtors joining in said petition are unable to meet their debts as they mature, and that they desire to effect a plan

of reorganization in connection with, or as a part of, the plan of reorganization of Missouri Pacific Railroad Company, Debtor, pursuant to said Section 77, and the Court being satisfied that said petition complies with said Section 77 and has been filed in good faith, it is Ordered:

(1) That said petition of Missouri Pacific Railroad Corporation in Nebraska et al., Debtors, be, and it is hereby approved, as to each and all of the Debtors joining therein, as properly filed under Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy, and in this proceeding in which the petition of Missouri Pacific Railroad Company has been filed.

(2) That the order heretofore entered herein on March 31, 1933, with respect to operating of railroads and other property of Missouri Pacific Railroad Company, payments of taxes, expenses, six months claims, and other items, and the exercise of other powers and privileges as therein set forth, and the orders entered herein on April 7, 1933, with respect to payments to pensioned employes and settlement of prior interline and certain other accounts, and the order entered herein on April 15, 1933, with respect to honoring of outstanding pay checks, are hereby extended to and made applicable to all the Debtors parties hereto.

(3) That the Debtors joining in the petition, hereby approved, of Missouri Pacific Railroad Corporation in Nebraska et al., shall close their present books of accounts as of the close of business on April 30, 1933, and shall open new books of account as of the opening of business on the following day, and cause to be kept therein due and proper accounts of the earnings,

expenses, receipts and disbursements of the Debtors, and shall preserve proper vouchers for all payments made on account thereof, and shall deposit the moneys coming into their hands in such of the banks in which funds of the Debtors are presently deposited as shall be selected by the respective Debtors, or in such other bank or banks as shall be selected by them and approved by this Court.

(4) That within forty days after the entry of this order, the Debtors joining in said petition shall file with the Clerk of this Court a statement of their assets and liabilities as of the close of business on April 30, 1933, and on or before the last business day of each calendar month thereafter shall file with said Clerk a statement of their assets and liabilities as of the close of business on the last day of the preceding month together with a summary statement of their revenues and expenses of such calendar month. Such statements may be made on a consolidated basis as to any Debtors all of whose capital stock is owned by any other Debtor. All such statements shall be certified as correct by the chief accounting officer of the respective Debtors.

(5) That for cause shown, the time within which the Debtors joining in said petition shall prepare the lists of their bondholders, creditors, and stockholders, and other information required by clause (c) of Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy is hereby extended to June 15, 1933.

(6) That this Court reserves full right and jurisdiction to make from time to time such orders as the Court shall deem proper, appointing a trustee or trus-

tees of the Debtors' property and estate, with all the title and powers of such trustee or trustees under and subject to the provisions of the Acts of Congress relating to bankruptcy, including the power to operate the business of the Debtors, fixing the time within which any plan of reorganization shall be proposed, accepted, and confirmed, requiring the Debtors to file such schedules and submit such information as may be necessary to disclose the conduct of the Debtors' affairs and the fairness of any proposed plan, fixing a reasonable time within which claims and interests of creditors and stockholders may be filed or evidenced and allowed and the division of creditors and stockholders into classes according to the nature of their respective claims and interests, and in general such orders amplifying, extending, limiting, or otherwise modifying this order as to the Court may at any time seem proper.

C. B. FARIS,
District Judge.

Dated May 2d, 1933.
Filed May 2, 1933. Jas. J. O'Connor, Clerk.

Exhibit E.

(Order No. 40)

In the

DISTRICT COURT OF THE UNITED STATES,
Eastern Division, Eastern Judicial District of Missouri

In the Matter of MISSOURI PACIFIC RAILROAD COMPANY, Debtor.	In Proceedings for the Reorganization of a Railroad. No. 6935.

ORDER APPOINTING TRUSTEES

It appearing to the Court that it is advisable at this time to appoint Trustees of the estates of all of the Debtors heretofore or hereafter made parties to this proceeding, and it appearing further that the Interstate Commerce Commission has selected and designated a panel of standing trustees, qualified for service as such, pursuant to subdivision (c) of Section 77 of Chapter VIII of the Acts of Congress relating to Bankruptcy, which panel contains the names of L. W. Baldwin and Guy A. Thompson, both of St. Louis, Missouri, It Is Ordered:

1. That the said L. W. Baldwin and Guy A. Thompson be and they are hereby appointed temporarily Trustees of all and singular the railroads, lands, properties, estates, rights and franchises, of whatever character and wherever situated, of Missouri Pacific Railroad Company; New Orleans, Texas & Mexico Rail-

way Company; International-Great Northern Railroad Company; Missouri Pacific Railroad Corporation in Nebraska; The Beaumont, Sour Lake & Western Railway Company; St. Louis, Brownsville & Mexico Railway Company; San Antonio, Uvalde & Gulf Railroad Company; and Houston North Shore Railway Company, Debtors; which appointment, as well as the other provisions of this order, shall be effective as of the beginning of business on July 1, 1933. Such appointment shall also apply to the estates of all Debtors hereafter becoming parties to this proceeding, from and after the respective dates of approval of the petitions of such subsequent Debtors. The said Trustees shall have all of the title, and subject to the control of this Court and consistently with the provisions of Section 77 of Chapter VIII of the Acts of Congress relating to Bankruptcy shall exercise all of the powers of Trustees appointed pursuant to Section 44 or any other section of the Acts of Congress relating to Bankruptcy.

2. That said Trustees shall have all of the powers, rights and privileges heretofore granted to or conferred upon the respective Debtors, or any of them, pursuant to any and all of the orders heretofore entered by this Court in this proceeding, and each and all of the orders heretofore entered in this proceeding shall, with respect to the Trustees and the property in their possession, be of like force and effect as though said Trustees were therein specifically named in place of said respective Debtors, all of said orders being hereby incorporated in and made a part of this order by reference. The Trustees shall pay out of the funds coming into their hands, as such Trustees, the cost of

maintaining the corporate organization of the Debtors, in addition to the necessary expense of preserving their records, registration and transfer of their stocks and bonds, and Trustees' charges under indentures under which securities of the Debtors have been issued.

3. That within ten (10) days from and after July 1, 1933, said Trustees shall each execute and file with the Clerk of this Court a bond or bonds with one or more sureties approved by the Clerk of this Court, for the benefit of whom it may concern, in the sum of $50,000, conditioned to the effect that they will well and truly perform the duties of their office, and duly account for all moneys and property whatsoever which may come into their hands, and abide by and perform all things which they shall be directed by the Court to do.

4. That the Debtors shall give notice to their creditors and stockholders of a hearing to be held before the undersigned Judge, in the Court Room of the United States District Court, Federal Building, St. Paul, Minnesota, on the 25th day of July, 1933, at eleven o'clock in the forenoon, Central Standard Time, to determine whether such appointment of said Trustees shall be made permanent or shall be terminated, or a substitute Trustee or Trustees or an additional Trustee or Trustees shall be appointed by the Court, by publishing notice of such hearing once a week for two consecutive weeks in one daily newspaper published and of general circulation in each of the cities of St. Louis and Kansas City, Missouri; Houston, Texas; Omaha, Nebraska; Little Rock, Arkansas; New Orleans, Louisiana, and New York, New York.

5. That all persons, firms and corporations having in their possession any of the property of the Debtors

are hereby ordered to deliver the same to the Trustees, and to make such transfers, assignments and conveyances in connection therewith as may be necessary and proper; and each and every of the officers, directors, agents and employees of the Debtors is hereby required to turn over and deliver to said Trustees, or their duly constituted representatives, any and all books of account, vouchers, papers, deeds, contracts, notes, securities, accounts, moneys or other property in his or their hands, or under his or their control belonging to or in the possession of the Debtors, and to abide by and conform to such orders as may be given from time to time by said Trustees, or their duly constituted representatives, in conducting the operation of the properties of the Debtors and in the discharge of their duties as Trustees.

6. That the Court reserves full right and jurisdiction to make from time to time such additional orders herein as to the Court shall seem proper, as well as any orders amplifying, extending, limiting or otherwise modifying this order, and in all respects to regulate and control the conduct of said Trustees.

C. B. FARIS,
District Judge.

Dated June 22d, 1933.

Filed June 22, 1933. Jas. J. O'Connor, Clerk.

Exhibit F.

(Order No. 57)

In the

DISTRICT COURT OF THE UNITED STATES,
Eastern Division, Eastern Judicial District of Missouri

In the Matter of MISSOURI PACIFIC RAILROAD COMPANY, Debtor.	No. 6935. In Proceedings for the Reorganization of a Railroad.

ORDER

Confirming Appointment, Entered June 22, 1933, Temporarily Appointing Trustees

---

On March 31, 1933, the Missouri Pacific Railroad Company, Debtor, filed its petition herein, stating that Debtor was unable to meet its obligations as they matured and would mature and that it desired to effect a plan of reorganization, in accordance with the provisions of Section 77 of Chapter VIII of the Act of Congress relating to bankruptcy.

The Court, being satisfied that said petition complied with said section of the Act and that it was filed in good faith, thereupon, on March 31, 1933, approved said petition as properly filed, under said section of the Act, and entered an order, authorizing the Debtor, pending further order of this Court in the premises, to operate and maintain the railroads and property

of the Debtor, wherever situated, and to manage and conduct its business, and to exercise general and specified powers, according to law, and subject to such supervision and control by the Court as the Court might exercise by further orders entered herein.

Subsequent to said date, petitions having been filed by various subsidiaries of said Missouri Pacific Railroad Company, Debtor, in this cause, and the Court, having fully considered said petitions, approved the same as properly filed under said section of the Act and entered orders authorizing said Debtors, pending the further order of this Court, in the premises, to continue to operate and maintain the railroads and property of said Debtors, wherever situated, and to manage and control the business of said Debtors and to exercise the different, sundry powers, according to law, specified in said orders, subject to the supervision and control of this Court as the Court might exercise by further orders entered herein.

On June 22, 1933, pursuant to the provisions of Section 77 of said Act, this Court entered an order, temporarily appointing L. W. Baldwin and Guy A. Thompson, both of St. Louis, Missouri, as temporary Trustees for the railroads and properties of, all and singular, the railroads, lands, properties, estates, rights and franchises, of whatever character and wherever situated, of all of said Debtors, said Trustees having been selected from a panel of standing trustees, designated and qualified for service as such, pursuant to sub-division (c) of Section 77 of Chapter VIII of the Act of Congress relating to bankruptcy. said order, appointing Trustees, to be effective as of the beginning of business on July 1, 1933, and said order specifying that such appointment should apply

to the estates of all Debtors hereafter becoming parties to this proceeding from and after the respective dates of approval of the petitions of such subsequent Debtors.

And said order, temporarily appointing said Trustees, having provided that notice should be published once a week for two, consecutive weeks in one, daily newspaper of general circulation in each of the Cities of St. Louis, and Kansas City, Missouri; Houston, Texas; Omaha, Nebraska; Little Rock, Arkansas; New Orleans, Louisiana, and New York, New York, notifying all persons, firms and corporations having in their possession any of the property of the Debtors to deliver the same to the Trustees, and notifying the creditors and stockholders of said Debtors that, on the 25th day of July, 1933, at eleven o'clock in the Forenoon, Central Standard Time, the undersigned Judge, in the Court Room of the United States District Court at the Federal Building in St. Paul, Minnesota, would determine whether such appointment of such Trustees should be made permanent or should be terminated or a substitute Trustee or Trustee should be appointed by the Court, and, it appearing to the Court that, within ten days from and after July 1, 1933, each of said Trustees executed and filed with the Clerk of the United States District Court for the Eastern Division, Eastern Judicial District Missouri, a bond, with solvent sureties, in the sum of fifty thousand dollars ($50,000.00), each, conditioned, as required in said order temporarily appointing said Trustees, entered June 22, 1933, and it further appearing to the Court that said Debtors have filed with the Court their report of compliance with said order, and that all known creditors and stockholders of the Debtors have been

notified of this hearing, in accordance with the provisions of Section 77 of Chapter VIII of said Act, and this hearing being now held in accordance with said notice and the provisions of said Act, and certain creditors and stockholders of the Debtors having appeared by Counsel at this hearing, and the Court, having heard the arguments of said Counsel, and being duly advised in the premises and being of the opinion that the interests of all parties will be best conserved by affirming, until the further order of this Court, the order entered by the Court herein on June 22, 1933, temporarily appointing said L. W. Baldwin and Guy A. Thompson, Trustees of the railroads and properties of said Debtors; it is, therefore,

Ordered, Adjudged and Decreed that said order temporarily appointing said L. W. Baldwin and Guy A. Thompson, Trustees for the railroads and properties of said Debtors, entered June 22, 1933, Be, and the Same Is Hereby, Confirmed and Approved, and said appointment of said Trustees is hereby made permanent, and the said L. W. Baldwin and Guy A. Thompson are hereby appointed permanent Trustees of, all and singular, the railroads, lands, properties, estates, rights and franchises, of whatever character and wherever situated, of the

Missouri Pacific Railroad Company,
New Orleans, Texas & Mexico Railway Company,
International-Great Northern Railroad Company,
Missouri Pacific Railroad Corporation in Nebraska,
The Beaumont, Sour Lake & Western Railway Company,
The St. Louis, Brownsville and Mexico Railway Company,

San Antonio, Uvalde & Gulf Railroad Company,
Houston North Shore Railway Company
and
Missouri-Illinois Railroad Company,

and such appointments shall also apply to the estates of all Debtors hereafter becoming parties to this proceeding from and after the respective dates of the approval of the petitions of such subsequent Debtors.

And said Trustees shall have all the title and be subject to the control of the Court and, consistently with the provisions of Section 77 of Chapter VIII of the Act of Congress relating to bankruptcy, shall exercise all of the powers of trustees appointed pursuant to Section 44 or any other section of the Act of Congress relating to bankruptcy.

Such Trustees shall have all of the powers, rights and privileges heretofore granted to or conferred upon them while temporary Trustees, and all of the rights, powers and privileges heretofore granted to or conferred upon the respective Debtors, or any of them, pursuant to any or all of the orders heretofore entered by this Court in this proceeding, and each and all of the orders entered in this proceeding shall, with respect to the Trustees and the properties in their possession, be of like force and effect as though said Trustees were therein specifiically named, instead of said respective Debtors, all of said orders being herein incorporated in and made a part of this order by reference.

And all persons, firms and corporations having in their possession any of the property of the Debtors or any of the property of the Debtors subsequently becoming parties to this proceeding are hereby ordered to deliver the same to said Trustees and to make such

transfers, assignments and conveyances in connection therewith as may be necessary and proper; and each and every of the officers, directors, agents and employes of the Debtors are hereby required to turn over and deliver to said Trustees, or their duly constituted representatives or agents, any and all books of account, vouchers, papers, deeds, contracts, notes, securities, accounts, moneys or other property in his or their hands, or under his or their control, belonging to or in the possession of any of said Debtors; and to abide by and conform to such orders as may be given from time to time by said Trustees, or their duly constituted representatives, in conducting the operations of the Debtors, and in the discharge of their duties as such Trustees.

And such Trustees are hereby authorized and directed to run, manage, maintain and, operate the railroads and properties of the Debtors, wherever situated, and to manage and conduct the business of each of said respective Debtors, and to exercise such sundry other powers according to law and subject to the supervision and control of the Court as the Court may exercise by other orders entered herein, all as set forth in the order of this Court temporarily appointing said Trustees, entered June 22, 1933, and in the supplemental order appointing Trustees, entered June 30, 1933, and in the order granting Trustees authority to employ Attorneys, entered July 1, 1933.

And the Court reserves full right and jurisdiction to make, from time to time, such other and further orders as the Court shall deem proper, amplifying, extending, limiting or otherwise modifying such orders of June 22, 1933, temporarily appointing said Trustees, and said orders of June 30, 1933, and July 1,

1933, and, in all respects, to regulate and control the conduct of said Trustees.

C. B. FARIS,
U. S. District Judge.

Dated: St. Paul, Minn., July 25, 1933.
Received and filed Jul. 26, 1933.
Jas. J. O'Connor, Clerk.

Exhibit 3.

IN THE DISTRICT COURT OF UNITED STATES FOR THE SOUTHERN DIVISION OF TEXAS, HOUSTON DIVISION.

TYRRELL & GARTH INVESTMENT COMPANY, Plaintiff VERSUS HOUSTON NORTH SHORE RAILWAY COMPANY, ET AL., Defendants	In Equity No.....

TO THE HONORABLE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, HOLDING SESSIONS AT HOUSTON:

Now comes Tyrrell & Garth Investment Company in the above styled cause, through its attorneys, and says:

I.

The said petition for removal is insufficient because the allegations therein contained with respect to what the records show as contained in the petition for re-organization of the Missouri Pacific Railroad Company filed in the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri (as well as the subsequent proceedings, orders and judgments claimed to have been entered therein) are the conclusions of the pleader; that unless certified copies or other duly authenticated copies of said proceedings are attached to the said petition for removal, it is impossible for the court to know what said orders, decrees and judgments of the District Court for the Eastern Division of the Eastern Judicial District of Mis-

souri actually show. The allegations of the petition for removal as to what said orders, judgments and decrees are in said United States District Court are merely the result of counsel's interpretation thereof, and are therefore the conclusions of the pleader.

Said Tyrrell & Garth Investment Company, through its attorneys, say that not until the 17th day of October, 1933, was its attorneys furnished a copy of the said application of petitioners, and that since said time and owing to the shortness of time, it has necessarily been wholly impossible for its counsel to see or inspect any of the records pending in said United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, nor has its counsel had access to what purports to be copies of any such records. Both the counsel and the court are entitled to have and inspect certified or authenticated copies of said proceedings in said United States District Court in order that this court may judge as to the correctness of the petitioners' conclusions as to what are the effects of said orders and decrees in said Missouri Court.

II.

Said Tyrrell & Garth Investment Company, through its counsel, says that it is not advised as to the correctness of the petitioners' allegations as to the proceedings had in the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, and the insufficiency of petitioners' application to have this cause removed is hereby set up because such instruments as are relied upon in said petition are not in fact attached to said petition.

III.

Your respondent Tyrrell & Garth Investment Com-

pany further says that it appears from the face of plaintiffs' petition for removal that the same is insufficient and states no grounds for removal and that said petition should therefore be dismissed or the application for removal denied by this court.

IV.

For other and further reply herein respondent says that on the 18th day of October, 1933, it has dismissed in the State Court so much of its petition as seeks an injunction against the defendants L. W. Baldwin and Guy A. Thompson in their official capacities and the Houston North Shore Railway Company and the Beaumont, Sour Lake & Western Railway Company, and respondent attaches hereto a certified copy of said order of dismissal in so far as said petition in the State Court seeks any injunction against said parties.

V.

Respondent says that the facts set up by said petition for removal do not legally disclose any proper grounds therefor, nor do said petitioners bring themselves within any provision of the law justifying the removal of this cause from the State Court into this Court.

There is attached hereto certified copy of plaintiff's First Amended Original Petition in the State Court. Plaintiff's petition, in accordance with said certified copy of the order of the State Court attached hereto, will be amended before trial so as not to seek an injunction against petitioners so long as they lawfully exercise jurisdiction over their property under control of the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri.

WHEREFORE, it is prayed that said petition for removal

be dismissed as without merit and as containing insufficient grounds for such removal, or that said application be denied upon its merits.

FRANKLIN & BLANKENBECKER,
Attorneys for
Tyrrell & Garth Investment Company.

STATE OF TEXAS,
COUNTY OF HARRIS.

BEFORE ME, the undersigned authority, on this day personally appeared, L. E. BLANKENBECKER, who being by me duly sworn says that he is a member of the firm of Franklin & Blankenbecker, attorneys for Tyrrell & Garth Investment Company; that he has read over the foregoing answer and the facts therein stated are within his knowledge true, except in so far as relates to legal contentions and propositions, and as to the latter he believes the same to be correct.

L. E. BLANKENBECKER.

SUBSCRIBED AND SWORN to before me this the 19th day of October, A. D. 1933.

(Notarial Seal)

S. B. CLARK,
Notary Public in and for
Harris County Texas.

TYRELL & GARTH INVESTMENT COMPANY, vs. HOUSTON NORTH SHORE RAILWAY COMPANY, ET AL.	No. 211736. IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS, SIXTY-FIRST JUDICIAL DISTRICT.

The plaintiff Tyrell & Garth Investment Company in open court having made known, through its attorneys, its desire to dismiss so much of the prayer in its amended petition on file herein as seeks to enjoin the defendants L. W. Baldwin and Guy A. Thompson in their official capacity as trustees in bankruptcy of the Houston North Shore Railway Company and the Beaumont Sour Lake & Western Railway Company and their prayer as well for injunction against said defendant Railway Companies, on account of said defendant railway companies being in bankruptcy under amendment to the bankruptcy Acts of Congress of 1933, pending in the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri and of which railroad companies said L. W. Baldwin and Guy A. Thompson are the trustees under appointment of said court;

IT IS NOW ORDERED, ADJUDGED AND DECREED, on motion of plaintiff's attorneys, that so much only of said cause of action as contained in plaintiff's amended petition as at this time seeks such injunction be and the same is hereby dismissed, without prejudice to the plaintiff hereafter to seek such injunction against said defendant railway companies when and if they shall be discharged from jurisdiction and control of said United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, but that otherwise plain-

tiff's amended petition and prayer and cause of action shall be in all things unchanged and unaffected by this order, and plaintiff will be hereafter required to file an amended petition in which said prayer for injunction only will be omitted, and shall not otherwise renew the same in this cause until an injunction in this cause from this court will not unlawfully interfere with the jurisdiction and control of said railway defendants and said Trustees by said United States District Court for the Eastern Division for the Eastern Judicial District of Missouri, so long as it lawfully exercises jurisdiction and control of the property of said railroad defendants.

.....,

Judge.

TYRRELL & GARTH INVESTMENT COMPANY, vs. HOUSTON NORTH SHORE RAILWAY COMPANY, ET AL.	No. 211/36 IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS, SIXTY-FIRST JUDICIAL DISTRICT.

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Tyrrell & Garth Investment Company, a joint stock association created by Declaration of Trust bearing date the 1st day of January, 1927, and recorded in the Deed Records of Harris County, Texas, in vol. 690 p. 528 *et seq.*, a resident of Harris County, Texas, hereinafter called plaintiff, and with leave of the Court first had, files its First Amended Original Petition, and complains of Houston North Shore Railway Company, a corporation created and existing under and by virtue of the laws of the State of Texas, with its residence and principal place of business in Harris County, Texas, and of Beaumont Sour Lake & Western Railway Company, a corporation created and existing under and by virtue of the laws of the State of Texas, with its residence and principal place of business in Harris County, Texas, and of L. W. Baldwin and Guy A. Thompson, who reside in St. Louis, Missouri, as Trustees of said railway defendants, under appointment of the District Court of the United States of the Eastern Division, Eastern Judicial District of Missouri, in cause No. 6935, in the Matter of Missouri Pacific Railroad Company, in proceedings for the Reorganization of a Railroad under the amendments to the Bankruptcy Act of Congress of 1933 (hereinafter referred to as Trustees), and of Harry K. John-

son, who resides in Harris County, Texas, hereinafter called defendants, and for cause of action plaintiff respectfully represents:

I.

That heretofore to-wit: on the ..... day of ....., 1925, W. C. Tyrrell Trust, a joint stock association, was the owner of several thousand acres of land located about sixteen miles East of Houston in Harris County, Texas, and described generally as Elena Fruit & Cotton Farms. Said W. C. Tyrrell Trust being desirous of having an interurban railroad constructed to and through said property from Houston, in Harris County, to Baytown and Goose Creek, in Harris County, Texas, for the purpose of materially adding to the value of its lands, entered into a certain contract in writing at said time with Harry K. Johnson, whereby it was agreed that said W. C. Tyrrell Trust would convey to said Johnson a right of way for the proposed interurban railroad over and across the lands of said W. C. Tyrrell Trust, in the form of an easement, subject to forfeiture for non-user for the purpose of an interurban railroad. Such non-user was in said instrument described and defined as being a failure to operate as an interurban railroad for a period of 30 successive days, exclusive of such time as operations might be prevented by conditions over which said Johnson had no control. It was provided in said contract that operation as an interurban railroad must include a passenger schedule over which first class coaches, operated by electric or gas engines, must be run over the entire line on a regular schedule of at least one train not less than every two hours of each day from six o'clock A. M. until twelve o'clock midnight. It was further in

said contract provided that in the event of forfeiture of said right of way, all buildings erected thereon should become the property of the W. C. Tyrrell Trust without the necessity of an accounting therefor and as liquidated damages. It was further agreed that in the event of forfeiture of the right of way, all buildings erected thereon should become the property of W. C. Tyrrell Trust as liquidated damages, but said Johnson was therein granted the privilege of removing all rails and attachments, all over head construction and electric equipment, such removal to be accomplished within 90 days from the date of forfeiture, or the same should likewise become the property of said W. C. Tyrrell Trust as liquidated damages. As a further consideration for said contract said W. C. Tyrrell Trust agreed to convey and did thereafter convey to said Johnson all the lands owned by it in the Jesse White and Henry White Surveys, lying West of the Crosby-Lynchburg shell road, being about 1100 acres, excepting 100 acres out of the Jesse White Survey adjacent to said road, and also sold to said Johnson three or four thousand acres of additional lands. Copy of said contract is hereto attached as a part hereof and marked "Exhibit A."

II.

Plaintiff alleges that said contract was entered into and performed, according to its terms, by the W. C. Tyrrell Trust for the purpose of inducing the construction and permanent operation of an interurban railway across said property between Houston, Texas, and Baytown and Goose Creek, Texas, in order to materially add to the value of its lands, as recited therein. Plaintiff alleges that said railway was afterwards constructed by

the said Harry K. Johnson and/or the defendants Houston North Shore Railway Company and Beaumont, Sour Lake & Western Railway Company, which latter two succeeded to the ownership, rights and obligations of said Johnson, the said Houston North Shore Railway having acquired ownership and control of said railway and all rights and obligations of Johnson in connection with said railway before its completion and having thereafter leased the same, under terms unknown to plaintiff, to the defendant, Beaumont, Lour Lake & Western Railway Company.

III.

Plaintiff alleges that thereafter on or about the 31st day of December, 1926, by instruments recorded in vol. 694, pp. 311-14 of the Deed Records of Harris County, Texas, the plaintiff Tyrrell & Garth Investment Company became the owner of all the lands and properties and the successor in interest and ownership of the W. C. Tyrrell Trust in and to all the lands described in said contract between W. C. Tyrrell Trust and Harry K. Johnson, and plaintiff is now the owner and holder of the same and is the successor in interest of all the rights, privileges and interest which the said W. C. Tyrrell Trust ever had and owned in connection with the execution of said contract.

VI.

Plaintiff alleges that in pursuance of said written contract W. C. Tyrrell Trust, acting therein by and through H. C. Tyrrell, its duly authorized and empowered trustee so to do, executed and delivered to said Harry K. Johnson a certain right of way easement or

conveyance, dated the 5th day of October 1925, which is recorded in vol. 689 p 465 of the Deed Records of Harris County, Texas, by the terms of which said W. C. Tyrrell Trust for a valuable consideration therein mentioned granted, sold and conveyed unto Harry K. Johnson, his heirs and assigns, the following described property, to-wit:

"The free and uninterrupted use, liberty and privilege of passage in and along a certain way across lands located in Harris County, Texas, on the waters of the San Jacinto River, about ..... miles of ..... of Houston sixty feet in width, the center line of which is described as follows:

"Commencing at a stake in the East side of the Crosby and Lynchburg road 960 feet South of the intersection of the said Crosby and Lynchburg public road and the Wallisville public road on North line of the Jessie White Survey;

"Thence East along the center of the said right of way parallel to the Wallisville road 588 feet;

"Thence to the right around a six (6) degree curve to a stake thirteen hundred and five (1305) feet from the point of beginning;

"Thence South forty eight (48) degrees east along the center of said right of way to a stake thirty one hundred and fifty three (3153) feet from the point of beginning;

"Thence to the left around a six (6) degree curve passing from the point of beginning;

"Thence to the left around a six (6) degree curve passing the East line of the Jessie White thirty six hundred and eighty eight (3688) feet;

"Thence to a stake thirty eight hundred and sixty six (3866) feet from point of beginning;

"Thence East parallel and adjacent to the public road to a stake which is eighty two hundred and forty (8240) feet from point of beginning;

"Thence to the right around a six (6) degree curve to a stake which is eighty seven hundred and forty (8740) feet from the point of beginning;

"Thence South fifty (50) degrees East along the center of the said right of way passing the North line of the William Hilbus survey at eleven thousand four hundred and ninety one (11,491) feet;

"Thence on said course to a stake which is thirteen thousand one hundred and forty two (13,142) feet from point of beginning;

"Thence to the right around a four (4) degree curve to a stake which is fourteen thousand six hundred and sixty (14,660) feet from the point of beginning;

"Thence South parallel and adjacent to the public road along the center of the said right of way to a stake which is twenty three thousand eight hundred and eighty nine (23,889) from the point of beginning and on the boundary line between the Elena Farms and the Busch tract, containing thirty two and nine tenths (32.9) acres;

"First thirty six hundred and sixty eight (3668) feet is in the Jessie White Survey containing five and five one hundredths (5.05) acres, the next seven thousand eight hundred and twenty three (7,823) feet lies in the Sanford Rice Survey and contains ten and seventy seven hundredths (10.77) acres, the last twelve thousand three hundred and ninety eight (12,398) feet lies in the William Hilbus Survey, and contains seventeen and eight one hundredths (17.08) acres."

It was in said deed expressly provided that the right of way and occupancy of the land above described were granted upon specific conditions of forfeiture and should be forfeited in the event of failure at any time to operate thereon an interurban railroad for a period of 30 successive days, exclusive of such times as operation might be

prevented by conditions over which grantee had no control; and it was further provided and defined in said deed that operation as an interurban railroad, as therein contemplated, must include a passenger schedule with first class coaches operated by electricity or gas engines passing over the entire right of way therein granted or thereafter granted by the W. C. Tyrrell Trust or its successor said Harry K. Johnson; said coaches to be operated under a regular schedule of at least one train not less than every two hours of each day from six o'clock A. M. until twelve o'clock midnight.

It was further stipulated in said conveyance that the parties were aware of the tendency of the courts to construe declarations of forfeiture as conditions rather than forfeiture provisions, and the same declared that it was intended thereby, in the grant of the said easement, that a forfeiture was intended in the event the conditions above stated were violated by the grantee. It was further therein provided that in event of forfeiture of the right of way, all buildings erected thereon should become the property of grantor, without the necessity of an accounting, and as liquidated damages; the grantee being given the privilege of removing all rails and attachments, all overhead construction and electric equipment, provided such removal was accomplished within ninety days from date or forfeiture, otherwise to become the property of grantor.

Plaintiff alleges that thereafter on or about January 24th 1927 by deed recorded in vol. 707 p 24 of the Deed Records of Harris County, Texas, said Harry K. Johnson conveyed said easement and right of way to the defendant Houston North Shore Railway Company, and it was likewise provided in said deed that the said defendant, its successors and assigns, were to have and

hold the same as an easement or right of way for the construction and operation of an interurban railroad upon the following conditions, viz: that the right of way and occupancy of said land should be forfeited in the event of failure at any time to operate thereon an interurban railroad for a period of 30 successive days, exclusive of such time as operations might be prevented by conditions over which grantee had no control. It was provided in said deed that operation as an interurban railroad, as therein contemplated, must include a passenger schedule with first class coaches operated by electricity or gas engines, passing over the entire right of way therein or thereafter granted by said Johnson or his successors in interest to defendant Houston North Shore Railway Company; said coaches to be operated on a regular schedule of at least one train not less than every two hours of each day from 6:00 o'clock A. M. until 12:00 o'clock midnight, and it was further therein provided that, in the event of forfeiture of the right of way, all buildings erected thereon should become the property of the said Johnson without the necessity for an accounting therefor, and as liquidated damages; with the privilege in said defendant railway company of removing all rails and attachments, all overhead construction and electrical equipment, provided such removal was accomplished within 90 days from the date of forfeiture, or the same should likewise become the property of said Johnson as liquidated damages. It was further in said conveyance provided that the parties thereto were aware of the tendency of the courts to construe declarations of forfeiture as conditions rather than forfeiture provisions, and it was declared that it was intended in said conveyance of the easement therein provided for that a forfeiture was intended in the event

the conditions above stated were violated by the said grantee, defendant.

Plaintiff alleges that prior to the date of said deed from said Johnson to defendant Houston North Shore Railway Company, said defendant was well aware of the conditions under which the said right of way above described was conveyed and contracted to be conveyed to said Johnson, but plaintiff alleges that, as a matter of fact, on account of the aforesaid prior conveyance by the said W. C. Tyrrell Trust to said Johnson, the said Johnson has no interest of forfeiture under said deed, the same having been reserved ahead of him in favor of the W. C. Tyrrell Trust in the said contract of 1925 hereto attached and in its conveyance to Johnson hereinabove set forth.

V.

Plaintiff alleges that thereafter by deed dated January 24th 1927 and recorded in vol. 655 p 555 of the Deed Records of Harris County, Texas, the said Harry K. Johnson conveyed to defendant Houston North Shore Railway Company over, along and through the following described property, an easement and right of way 100 feet wide, except through the town of Highlands, Texas, where it is 60 feet wide, as follows:

> "Starting at a point nine hundred sixty (960) feet South of the Southwest corner of the intersection of the Crosby-Lynchburg Road and the Wallisville Road; said point is on the West line of the Crosby-Lynchburg Road and is the point of beginning, and is the center line of the sixty (60) foot right-of-way herein conveyed;
>
> "Thence South 80° 4' West forty nine hundred fifty two and two tenths (4952.2) feet to the point of a 3° curve;

"Thence to the left around the curve Four hundred sixty seven and eight-tenths (467.8) feet to the West line of the Town of Highlands. The right-of-way herein conveyed excludes the following sixty (60) foot streets, 2nd, 3rd, 5th, 6th, 7th, 8th, 9th, 10th, 11th, and 12th, and contains six and sixty three hundredths (6.63) acres, located in the town of Highlands;

"Thence continuing the 3° curve twelve hundred sixty seven and twenty five hundredths (1267.25) feet to point of tangent;

"Thence South 28° 1' West fifty nine hundred twelve and five tenths (5912.5) feet to the West bank of San Jacinto River. This strip or parcel of land is one hundred (100) feet wide by seventy one hundred seventy nine and seventy five hundredths (7179.75) feet long, and contains sixteen and forty-seven (16.47) acres, located in the Henry White Survey, Harris County, Texas."

Plaintiff alleges that said latter described property was a part of the property described in said agreement between the W. C. Tyrrell Trust and Harry K. Johnson hereto attached, and being out of and a part of said 1100 acres described in said contract in the Jessie White and Henry White Surveys, which the said W. C. Tyrrell Trust agreed by said contract to convey and did convey to said Johnson as a part of the consideration of said contract covering the construction of said interurban railroad. Plaintiff alleges that the right of way described in said last named conveyance from Johnson to the Houston North Shore Railway Company coming out of said Henry White and/or Jessie White Surveys was likewise, under the terms of said contract of 1925 between Harry K. Johnson and W. C. Tyrrell Trust above described, subject to the forfeiture provisions in said

contract of 1925, the said deed to Johnson for the 1100 acres in said White Surveys having been made by virtue of and in consideration of said contract of 1925, and so that the right of way to the Houston North Shore Railway Company across said surveys was likewise subject to the forfeiture terms of said contract between Johnson and the said W. C. Tyrrell Trust.

VI.

Plaintiff alleges that defendant Houston North Shore Railway Company, prior to the completed construction of said interurban railway between Houston, Baytown and Goose Creek, acquired all interest in the same, including the right of way easements in question, from said Johnson and the defendant is now the owner of said interurban railway, but that the defendant, Beaumont, Sour Lake & Western Railway Company and/or said Trustees are operating the same under a long time or permanent lease between the said defendant railway companies, with the terms and nature of which this plaintiff is not familiar and therefore cannot allege, same being peculiarly within their knowledge.

Plaintiff says that the defendant Houston North Shore Railway Company and Beaumont, Sour Lake & Western Railway Company at all times prior to and at the time of acquiring the interest of said Johnson in said easements and rights of way by the conveyances above mentioned, had complete and full knowledge of the terms of the contract between the said Johnson and the said W. C. Tyrrell Trust of 1925, with full notice and knowledge of all its terms, the said contract having been shown to and furnished by said Johnson to the executive officers of both defendant railway companies.

VII.

Plaintiff alleges that under the terms of said contract hereto attached, an interurban railway was constructed by the defendants and said Johnson between Houston, Texas, and Baytown and Goose Creek, Texas, as was therein provided should be done, and the defendant railway companies, at or about the time of the completion of said interurban railroad, began the operation of electric cars on hourly service between Houston and Goose Creek and Baytown, and so operated the same for several years. The construction and interpretation of the contract hereto attached between the defendants and this plaintiff was that the line of railway was to be operated, as in fact it was, built and operated between Houston and Goose Creek, via Baytown; the said railway having been so constructed and put in operation as aforesaid; and that the clause in said contract, "must be run over the entire line on a regular schedule of at least one train not less than every two hours of each day from six o'clock A. M. until twelve o'clock midnight," meant and was intended to mean that at least one train would be operated over the entire line between Houston and Goose Creek not less than every two hours of each day from six o'clock A. M. until twelve o'clock midnight, and that such was the meaning of the words "entire line" as used in the contract. While plaintiff alleges said expression "entire line" is clear and unambiguous and means the entire line of railway constructed across plaintiff's property from the termini of the railroad, nevertheless plaintiff says, alternatively, that if such expression is in any way ambiguous as used in the contract, such was its meaning, intent and purport, not only at the time of the execution of said con-

tract but by subsequent construction and interpretation of the same by the defendants in so operating their trains under it.

That the language in the said conveyance from the W. C. Tyrrell Trust to Harry K. Johnson of date October 5th 1925, "Passing over the entire right of way herein or hereafter granted by me or my successor in interest to the said Harry K. Johnson" meant and was intended to mean over the entire right of way between the termini of Houston and Goose Creek, if such language is in any manner ambiguous, as plaintiff says it is not, but says, alternatively, if same is ambiguous, that such was intended to be and was at all times interpreted by the parties hereto to be its meaning, purport and effect.

VIII.

Plaintiff says that at or about December 1931 the defendant railway companies stopped and have since ceased the operation of electric passenger coaches or coaches operated by gas engines into the City of Houston, and has since operated said cars just outside of the corporate limits of the City of Houston, or within a few feet inside the corporate limits, and so that first class coaches operated by electricity or gas engines were and are not running over its entire line as constructed into the City of Houston but the continuity of operation was and has since been discontinued, causing passengers to have to transfer from electric interurban cars at or near the corporate limits several miles from the business district of Houston, and take separate and different transportation into Houston on buses maintained by defendants from the corporate limits to the business section. Plaintiff alleges that said conduct on the part

of the defendants was and is a violation of said existing contracts and agreements between the said Harry K. Johnson and the said W. C. Tyrrell Trust, in that such operation does not include passing over the entire right of way as in said contract and deeds set forth. Plaintiff alleges that the result of making passengers thus change their mode of transportation and transfer from one conveyance to another is to make the electric interurban transportation provided for in said contract wholly unattractive for passengers and destroys the desirability, usefulness and convenience of said service, so that the same is worthless and practically unused by the public.

Plaintiff, moreover, alleges that at or about the month of February, 1933, the defendant railway companies wholly stopped and they and defendant trustees, their agents and servants, have since said time ceased maintaining any passenger service by electric interurban or by gas engines passing over the entire line of railway and over the rights of way herein described on a regular schedule of at least one train not less than every two hours of each day from six o'clock A. M. to twelve o'clock midnight and have continued for much more than 30 days a failure to maintain any service from six o'clock A. M. to 9:30 A. M. or maintain any service from 1:30 P. M. to 5:30 P. M. or to maintain any service between 9:30 P. M. to 12:00 midnight over the entire line or over the rights of way herein described, as in said contracts provided for, and plaintiff says that defendants and/or said Trustees are not now maintaining service over the entire line or over the rights of way herein described on a regular schedule of at least one train passing over the right of way herein described or over the entire line not less than every two hours of each day from 6:00 A. M. to twelve o'clock midnight and have not

done so for more than 30 days prior to the filing of this suit.

Plaintiff says that by reason thereof the defendants and each of them under the terms of said contract and under said deeds have forfeited to this plaintiff, as successor to the W. C. Tyrrell Trust, all of said rights of way and easements thereover hereinbefore described acquired by the defendant Houston North Shore Railway Company through said Harry K. Johnson from the said W. C. Tyrrell Trust.

Plaintiff alleges that defendant railway companies and said defendant Trustees, their agents and servants, are each and both now, by reason of the facts aforesaid, trespassers upon said property and rights of way above described, and this plaintiff has elected and does hereby elect to declare a forfeiture of said easements and of said rights of way, and has elected to declare and does hereby declare that the said Houston North Shore Railway Company and said defendant Trustees their agents and servants, and defendant Johnson have no further title thereto or rights or privileges therein by the terms of said contract and by its said deeds and this plaintiff says that the said deed from W. C. Tyrrell Trust to Johnson of date October 25, 1925, and said Johnson's deeds covering any of the rights of way acquired by him from W. C. Tyrrell Trust to Houston North Shore Railway Company should be delivered up and be cancelled and held for naught.

IX.

Plaintiff further alleges, as aforesaid, that the defendant railway companies, at all times prior to acquiring the interest of said Harry K. Johnson in the construction and operation of said interurban railway,

had notice and knowledge of the terms and conditions, as in the contract hereto attached set forth, upon which the said Harry K. Johnson acquired by purchase several thousand acres of land from the said W. C. Tyrrell Trust, and that the conditions upon which said lands was so sold to Johnson and the rights of way aforesaid so granted to him were upon the distinct consideration that an interurban railway would be constructed and that a passenger schedule of first class coaches operated by electric or gas engines must be run over the entire line, on a regular schedule, of at least one train not less than every two hours of each day from 6:00 o'clock A. M. until 12:00 o'clock midnight. Plaintiff says that the defendant Houston North Shore Railway Company acquired the said Johnson's rights in the construction and operation of said interurban railway over this plaintiff's lands above described as the successor to said Johnson and, as a matter of law, burdened with his obligations, and, in consideration of so acquiring the same from said Johnson, undertook and assumed to construct and operate said railroad as in said contract provided for with respect to schedules for passenger service. Plaintiff alleges that defendant Houston North Shore Railway Company having assumed said construction and said operation as the successor to Johnson, the said defendant railway companies did for several years carry out and perform the schedule and passenger interurban service as in said contract provided for. Plaintiff says, however, that at or about the times aforesaid defendant railway companies ceased to maintain the passenger service as in said contract provided for and said defendants and said Trustees, their agents and servants, breached the said contract and have continued to breach the same in the manner hereinabove set forth, and so

that the operation of said interurban railway has become practically useless to this plaintiff as the successor in right and interest and title of the properties of the W. C. Tyrrell Trust.

As the successor in ownership of the lands and properties and rights under said contract of the said W. C. Tyrrell Trust, plaintiff now owns a large amount of land in the vicinity of Highlands, Texas, where the right of way hereinabove described is located. That said manner of service above described, in its failure as aforesaid to carry out said contract and agreement between the said W. C. Tyrrell Trust and the said Harry K. Johnson, has resulted in great damage to this plaintiff in this, viz: that it acquired the said properties and rights from the said W. C. Tyrrell Trust upon the faith of the carrying out of said contract by the defendant railway companies with respect to passenger service, and plaintiff says that failure to continue said interurban passenger service as in said contract provided for, and the violation of said agreement in the respects hereinbefore alleged, has resulted in great damage to this plaintiff in the depreciation of the value and use of its lands in said vicinity of Highlands, Texas. Plaintiff alleges that the failure to maintain said passenger service and the curtailment and limitation of the same, which plaintiff alleges to be permanent, has resulted in great depreciation of the market value of its properties by reason of making the same less accessible and convenient for transportation and by reason of the limitation of the use of said interurban railway for prospective purchasers of its property. That the decreased market value of its properties, so acquired by it, from and as the successor of the said W. C. Tyrrell Trust amounts to $150,000.00, in which amount it has been damaged

by reason of the failure to carry out said passenger service as in said contract provided for.

X.

Plaintiff further alleges that, as in said contract provided, said W. C. Tyrrell Trust conveyed to the said Harry K. Johnson the following described property, to-wit:

All land owned by it in the Jesse White and Henry White Surveys lying West of the Crosby-Lynchburg shell road in Harris County, Texas, being about eleven hundred (1100) acres, excepting one hundred (100) acres out of the Jesse White Survey adjacent to said road, as a bonus to said Johnson for the construction and operation of said railroad after the same had been completed and was in operation for thirty days. Said 1000 acres of land was one of the distinct considerations moving from the said W. C. Tyrrell Trust for the execution of said contract, and while the said contract provided, that the title in same to defendant Johnson should not be subject to the terms of forfeiture as in said contract provided with respect to the rights of way, nevertheless said land was so conveyed to defendant Johnson as a part of the consideration to him for the construction and operation of said interurban railroad. Said contract recited that the operation of said interurban would materially add to the value of the lands of the said W. C. Tyrrell Trust and further recited that the consideration advanced by the said Trust was essential to the successful operation of the same, and further defined the term "operation", as used in said contract, as meaning "a passenger schedule over which first class coaches, operated by electricity or gas engines must be run over the entire line on a regular schedule of at least one train

not less than every two hours of each day from six o'clock A. M. until twelve o'clock midnight."

XI.

Plaintiff says that the consideration upon which it, W. C. Tyrrell Trust conveyed to said Johnson said 1000 acres of land, viz., not only the construction but the operation of said railroad, as in said contract defined, has therefore failed on account of failure on the part of defendants to operate said interurban in the manner provided therein and in operating the same on the limited schedule hereinbefore alleged. That one of the considerations moving from the W. C. Tyrrell Trust was said land in the Jesse White and Henry White Surveys which land was of the reasonable value when conveyed to said Johnson of $20,000.00. That the aforesaid failure to operate said interurban according to the schedule provided in said contract has resulted in a failure of the consideration to the great injury of this plaintiff and whereby it would be inequitable and unjust for defendant Johnson to retain the full fruits of said conveyance of said land in said White Surveys. That the whole consideration to be received on the part of the said Trust was the passenger schedule and since the same is not being carried out and the defendants announce their unwillingness to carry the same out further than is being done, as hereinbefore alleged, and to plaintiff's injury, plaintiff says that said Johnson ought in equity and in good conscience be required to make good such failure of consideration according to the principles and laws of equity. That since the defendants Houston North Shore Railway Company and Beaumont, Sour Lake & Western Railway did, as aforesaid, take their respective interests in said railway with full notice of all the terms of said

contract between said Johnson and W. C. Tyrrell Trust, and since it is impossible for said Johnson to carry out said schedule, the said defendant railroads and their said Trustees are likewise legally liable to plaintiff, to the same extent as said Johnson, on account of the said schedule being wholly within their control. Plaintiff says said railway defendants and their said Trustees have thus made the performance of said schedule by said Johnson wholly impossible.

XII.

Plaintiff alleges that an equitable diminution from the value of said lands in the White Surveys on account of said failure of consideration would be not less than one half of the market value of the same at the time they were so conveyed to Johnson as aforesaid, and that plaintiff is entitled to recover from defendants the further sum of $10,000.00 as and for said partial failure of consideration in so conveying to said Johnson said lands.

WHEREFORE, premises considered, plaintiff prays for citation against defendants and said Trustee defendants, F. W. Baldwin and Guy A. Thompson, and that upon a final trial hereof, the said deed of the said W. C. Tyrrell Trust of date October 5, 1925, to defendant Harry K. Johnson, recorded in vol. 689 p 465 of the Deed Records of Harris County, Texas, be delivered up, cancelled, annulled and held for naught, and that the said deed from Harry K. Johnson to the defendant Houston North Shore Railway Company dated January 24, 1927, recorded in vol. 707 p 24 of the Deed Records of Harris County, Texas, be likewise cancelled, annulled and held for naught as an existing cloud upon plaintiff's title to the lands and properties therein conveyed, and that the

deed of defendant Harry K. Johnson to Houston North Shore Railway Company dated January 24, 1927, and recorded in vol. 655 p 555 of the Deed Records of Harris County, Texas, be cancelled, annulled and held for naught, in so far as it conveys or purports to convey to the Houston North Shore Railway Company any lands, easements or rights of way in the Jessie White and Henry White Surveys in Harris County, Texas.

Plaintiff further prays that upon final trial the defendants and the defendants said Trustees and each of them be perpetually enjoined and restrained from making further use of the lands therein described and be perpetually enjoined from using the same for right of way purposes for the operation of an interurban railway or for any other purpose whatsoever, and especially from using the same for the operation of trains, cars, or coaches thereon and for use in any manner as a railway or interurban railway right of way.

Plaintiff further prays for the recovery from the defendant Houston North Shore Railway Company and from the said defendant Trustees in their said capacity as Trustees, of its said damages in the sum of $150,000.00 and from the said Houston North Shore Railway Company and Beaumont Sour Lake & Western Railway Company and from defendant Johnson said sum of $10,000.00, and costs of suit, and for such other and further relief, special or general, legal or equitable as against all the defendants including said Trustees as it may be properly entitled to receive, and that said judgment be certified to the District Court of the United States of the Eastern Division, Eastern Judicial District of Missouri for observance.

.....

Attorneys for Plaintiff.

STATE OF TEXAS,
COUNTY OF HARRIS.

.....being duly sworn says that he is agent of the plaintiff herein and that the allegations above set out are true and correct.

.....

Subscribed and sworn to before me this the.....day of October, A. D. 1933.

.....

Notary Public in and for
Harris County, Texas.

EXHIBIT "A"

STATE OF TEXAS,
COUNTY OF JEFFERSON.

1. Memorandum of Agreement by and between the W. C. Tyrrell Trust, a joint stock association created by an agreement and Declaration of Trust bearing date the 31st day of December 1919, and appearing of record in the Deed Records of Jefferson County, Texas, Volume 190 page 597, reference to which is made, acting herein by and through H. C. Tyrrell, the duly appointed and qualified Trustee of said Trust, hereinafter referred to as First Party and Harry K. Johnson of Harris County, Texas, hereinafter referred to as Second Party:

WITNESSETH:

2. WHEREAS, First Party is the owner of approximately Sixteen Thousand (16,000) acres of land located about Sixteen (16) miles East of Houston in Harris County, Texas, known as Elene Fruit & Cotton Farms; and

Whereas Second Party is desirous of constructing an Interurban Railroad to and through the property of First Party to Baytown in Harris County, Texas, and First Party recognizes that the construction and operation of the proposed Interurban Railroad in a first class condition will materially add to the value of First Party's said lands; and

3. Whereas, second party is convinced that the assistance of First Party to said Interurban Railroad project, to the extent indicated by the agreement of First Party hereinafter set out, is essential to the successful construction and operation of said Interurban Railroad;

4. Now, THEREFORE, it is agreed as follows, to-wit:

First Party will convey to Second Party a sixty (60) foot right-of-way for the proposed Interurban railroad over and across the lands of First Party, second party to have the privilege of designating the route of said right-of-way through the lands of First Party with the following qualifications, viz., that said line shall in no event cross the Crosby-Lynchburg Road further South than the location of the South line of lot 12 of Unit "C" of the Elena Fruit and Cotton Farms as shown by the map thereof, copy of which is attached hereto, signed by First and Second Parties for identification.

5. The location of the right-of-way of said Interurban Railroad after crossing the said Crosby-Lynchburg Road, shall be determined by agreement of the parties hereto and in the event of their failure to reach an agreement thereon, location of the line shall be determined by arbitration in the usual manner, i.e., each Party hereto to select an arbitrator and those two, a third. The decision of the arbitrators to be in all respects binding upon the Parties to this agreement as to the location of the portion of the line last above referred to; the conveyance to be in the form of an easement, subject to forfeiture for non-user for the purpose of an Interurban Railroad, a definition of a non-user being a failure to operate as an Interurban Railroad, for a period of thirty (30) successive days, exclusive of such time as operations may be prevented by conditions over which Second Party has no control. Operation as an Interurban railroad must include a passenger schedule over which first class coaches, operated by electricity or gas engines, must be run over the entire line on a regular schedule of at least one train not less than every two hours of each day from six (6) o'clock A. M. until Twelve (12) o'clock midnight.

6. Regular service on said Railroad must begin not later than the 1st of July, 1926, but to the extend Second Party is delayed in construction by strikes, litigation or other conditions over which he has no control, time shall be added to the above limit.

7. The requirement that trains propelled by electricity or gas engines on said Interurban Railroad, is not intended to prevent the use of trains propelled by steam in the event of an emergency or in addition to the electric or gas trains.

8. In event of forfeiture of right-of-way, and other lands as herein provided for, all buildings erected thereon shall become the property of First Party, without the necessity for an accounting therefor, and as liquidated damages.

9. In the event of forfeiture of right-of-way Second Party is granted the privilege of removing all rails and attachments, all over head construction and electric equipment; such removal must be accomplished within 90 days from date of forfeiture or the same shall likewise become the property of First Party as liquidated damages.

10. First Party agrees to convey to Second Party, in fee simple the tract of land hereinafter described, said land being located in Harris County, Texas, and described as follows:

> All land owned by First Party in the Jesse White and Henry White Surveys, lying West of the Crosby & Lynchburg shell road, being about 1100 acres, excepting one hundred acres out of the Jesse White Survey adjacent to said road.

11. When Second Party shall have satisfied First Party that he is prepared and able to carry out the terms of this agreement, First Party will execute the necessary conveyance to the above land, the same to be placed in escrow in the American National Bank of Beaumont, with a copy of this agreement, for delivery to Second Party, upon completion of said Railroad and the operation thereof for 30 days. The conveyance of such tract of land is intended as a bonus by First Party to Second Party for the construction and operation of said Railroad for the time indicated and said land is not to be subject to forfeiture.

12. As a further consideration moving from First Party to Second Party for the construction and operation of said Railroad, First Party agrees that he will execute a conveyance to Second Party, covering the following described tracts of land in said Farms, to-wit:

As shown on the map of said Farms hereinabove referred to and as indicated on "Land Price Schedule" herewith, said land containing approximately 5097.8 acres, to be paid for by Second Party as per schedule attached hereto and designated "Land Price Schedule", the whole consideration therefor to be represented by Second Party's vendor's lien promissory notes dated the date of the conveyance and payable at Beaumont, Texas, or Houston, Texas, as follows:

13. Sixty-three thousand, six hundred forty nine dollars and 06/100 ($69,649.06) on or before the first day of July 1927.

Sixty-three thousand, six-hundred forty-nine Dollars & 06/100 ($63,649.06) on or before the 1st day of July, 1928.

Sixty-three thousand, six hundred forty nine Dollars

& 07/100 $63,649.07) on or before the 1st day of July, 1929.

Sixty-three thousand, six hundred forty nine Dollars & 07/100 ($63,649.07) on or before the 1st day of July, 1930, each of said notes bearing interest at the rate of 6 per cent per annum after July 1st, 1926, payable semi-annually on the 1st day of January & July each year thereafter providing that failure to pay any one note or interest thereon when due shall at the election of the owner or holder, mature all, providing for 10% additional as attorney's fees if not paid when due and placed in the hands of an attorney for collection and reciting the vendor's lien; said notes to be further secured by a Deed of Trust executed by Second Party covering said property and providing that failure to pay said notes principal or interest, when due, shall mature all of the same at the election of the owner thereof and authorizing a foreclosure thereunder, the same to be in the usual so called "long form" requiring vendee to pay one-half (½) of all taxes accruing for the year 1926 and other charges and assessments which might be levied against said lands by lawful authority during the time after July 1st, 1926, said Deed with said Deed of Trust and said vendor's lien notes to be placed in the American National Bank of Beaumont and said deed of trust and notes to be delivered to First Party when said deed is delivered to Second Party; said deed shall be delivered to Second Party on submission to First Party of satisfactory evidence of the expenditures by Second Party of the sum of $50,000.00 in the actual construction of an Interurban Railway as herein provided for, and shall provide for the release by First Party of the vendor's lien upon lands described therein in accordance with the "Land Price Schedule" attached hereto of even date

herewith and signed by the Parties hereto for identification.

14. The Deed reserving the vendor's lien and the Deed of Trust securing the above described notes shall contain a clause providing that Second Party may re-convey subject to the conditions hereinafter stated to First Party, at any time on or after July 1st, 1926, all lands remaining unsold out of the 5097.8 acres described in paragraph 12, in liquidation of the then unpaid notes given by Second Party to First Party therefor, and the First Party agrees to return to the Second Party all the unpaid notes of Second Party then outstanding and given for said land and cancel the Deed of Trust securing the same, both Parties being relieved of any further liability under said conveyance and Deed of Trust. However this reconveyance of said lands and the cancellation of said Deed of Trust and the surrender of said notes will have no effect whatever upon previous sales of land, the donation of the tract of land hereinbefore referred to, the right-of-way granted under this contract nor in any way affect or release the Second Party from any of the other obligations assumed hereunder. As a condition precedent to reconveyance by Second Party to First Party in liquidation of Second Party's said notes, Second Party is required to account to First Party for all sales of lands out of said 5097.8 acres in manner and form set out in paragraph 16 hereof.

15. It is understood that the sale of each tract or fractional part thereof sold by the Second Party after construction work has begun is to be treated as a separate and distinct transaction and on payment to the First Party of the amount per acre as provided for in the "Land Price Schedule", all the remaining cash, notes,

or other evidences of debt, involved in the purchase or sale of said tract or parcel of land becomes the property of the Second Party and are to be delivered to him for his benefit.

16. Second Party agrees that in the sale of any portion of said 5097.8 acres of land whether the same be by Deed or contract, to report all such transactions to First Party daily, and will daily deposit for collection and disposition as hereinafter provided with the Houston National Bank of Houston, Texas, all purchasers' vendor's lien notes with proper transfer of the vendor's lien to First Party and obligations for payment, together with cash payments received on such sales. All such deposits shall be held by said Bank and the money collected thereon paid to First Party on the first and fifteenth of each month, for the account of Second Party until the said 5097.8 acres of land has been fully paid for and released by First Party as provided "release clause" in conveyance by First to Second Party of said 5097.8 acres or until the said 5097.8 acres, or the remnant thereof, are reconveyed to First Party as provided in Paragraph Fourteen (14) and all money so received shall be credited on the then next maturing note of Second Party hereunder. All payments contracted to be made by vendees of Second Party affecting said 5097.8 acres of land or any part thereof, shall be contracted by vendees to be paid at Houston, or Beaumont, Texas. In the event Second Party reconveys said land or any portion thereof to First Party, in accordance with paragraph fourteen (14), then said Bank is authorized and hereby instructed to deliver to First Party all collections then in its hands on sales made by Second Party in pursuance hereof, as well as to deliver to First Party all notes or securities, Deed of Trust, transfers of vendor's lien,

abstracts, insurance policies or other valuable papers incident to or connected with sales made by Second Party from said 5097.8 acre tract which notes etc. may remain in said bank after Second Party has elected to so reconvey.

17. First Party agrees that he will release the vendor's lien on any portion of said 5097.8 acres of land when same have been fully paid by Second Party or by Second Party's respective vendees thereof, such payments to be in accordance with the "Land Price Schedule" above provided for and all such payments to be credited on the then next maturing note of Second Party.

18. Second Party agrees that his heirs or assigns will not, prior to the beginning of active construction by the Second Party hereinabove provided, for give general publicity to this agreement. Second Party acknowledging that such publicity would constitute a cloud upon First Party title to the lands described and in the event of Second Party's failure to consummate the said railroad construction, might interfere with the marketing of said lands. Should the project for any reason be delayed or abandoned, Second Party agrees to give written notice to First Party so as to cause as little inconvenience as possible.

19. It is mutually agreed that pending the beginning of construction of said railroad, as hereinafter provided, that First Party has the privilege of selling any portion of said 5097.8 acres of land but in the event any of such land is sold by First Party, First Party agrees to credit to account of Second Party, 11½% of the selling price of such lands, said credits to be allowed in cash covering one-half of each payment as made after forty per cent of the purchase price has been paid. Each sale to be a

separate transaction and all credits to Second Party to be cancelled in case of his failure to carry out his part of this contract.

20. The Second Party agrees to begin construction work on said Railroad within 60 days from the signing of this agreement, or forfeit his rights under this contract and option, and further that if and when construction shall begin that the right-of-way shall be located through the property of the First Party east of the Crosby-Lynchburg Road within 90 days from the signing of this agreement, and that work done and material furnished in connection with said construction will amount to not less than $10,000.00 within said 90 days and that fifty thousand dollars in work and material will have been furnished within four months of the signing of this contract. Failure to comply with either condition within the time limit specified will forfeit the rights of Second Party under this contract. It is understood that in the purchase of rails, electric equipment, and cars, the contract usually provides for a cash payment or bank guarantee when the contract is accepted, and that this advance payment or bank guarantee will be considered as material furnished the First Party that said cash payment has been made or guarantee given, and further that failure to do said work or furnish satisfactory evidence of cash payment or bank guarantee on request of First Party will be sufficient grounds for the cancellation of the rights of Second Party under this contract. It is understood, however, that the Second Party may extend the time for 60 days in which work is to be done or material furnished by delivering to First Party a bond, approved by First Party, for the sum of $10,000.00, payable to First Party as liquidated damages in case of failure to carry out the provisions of this con-

tract or Second Party may in lieu thereof deposit $10,000.00 in escrow in a bank or Trust Company approved by First Party to be paid First Party as liquidated damages in case of failure of second party to comply with his obligations herein by him undertaken or to be returned to the Second Party when $50,000.00 of work and material has been done or furnished within said four months plus the extension of sixty days. In event Second Party forfeits his rights under this contract by failure to begin construction within the time in this paragraph provided, his liability shall be the penalty of the bond in this paragraph provided for. Provided, however, that Second Party shall not thereby be relieved from full settlement with First Party for all lands conveyed by First Party to Second Party as herein otherwise provided for.

21. It is agreed and understood that to secure a satisfactory entrance and terminal facilities in the City of Houston, the owners of said Railroad may operate its cars over the tracks of some steam railway and in the City of Houston over the tracks of the Houston Electric Company.

33. It is understood that it may be necessary to rearrange the sub-division of the tract of land described in paragraph 12, in which case the Second Party will have a survey made and recorded to facilitate describing of land when sold.

23. References in this contract to liquidated damages accruing in favor of First Party are to be interpreted as cumulative to the end that a liquidated damage claimed by First Party in one of the instances provided shall not prevent him from setting up a claim for liquidated damages in any other contingency in his contract provided.

24. In the event of disagreement as to the interpretation of this contract, where not otherwise provided all matters in controversy shall be left to arbitration as provided above.

25. The rights of the Parties under this contract, it is agreed, are assignable by either party hereto.

In witness whereof the parties hereto have signed their names this ..... day of ..... 1925.

.....

First Party.

.....

Second Party.

FILE COPY

JAN 2 1934
CHARLES ELMORE CROPLEY
CLERK

IN THE

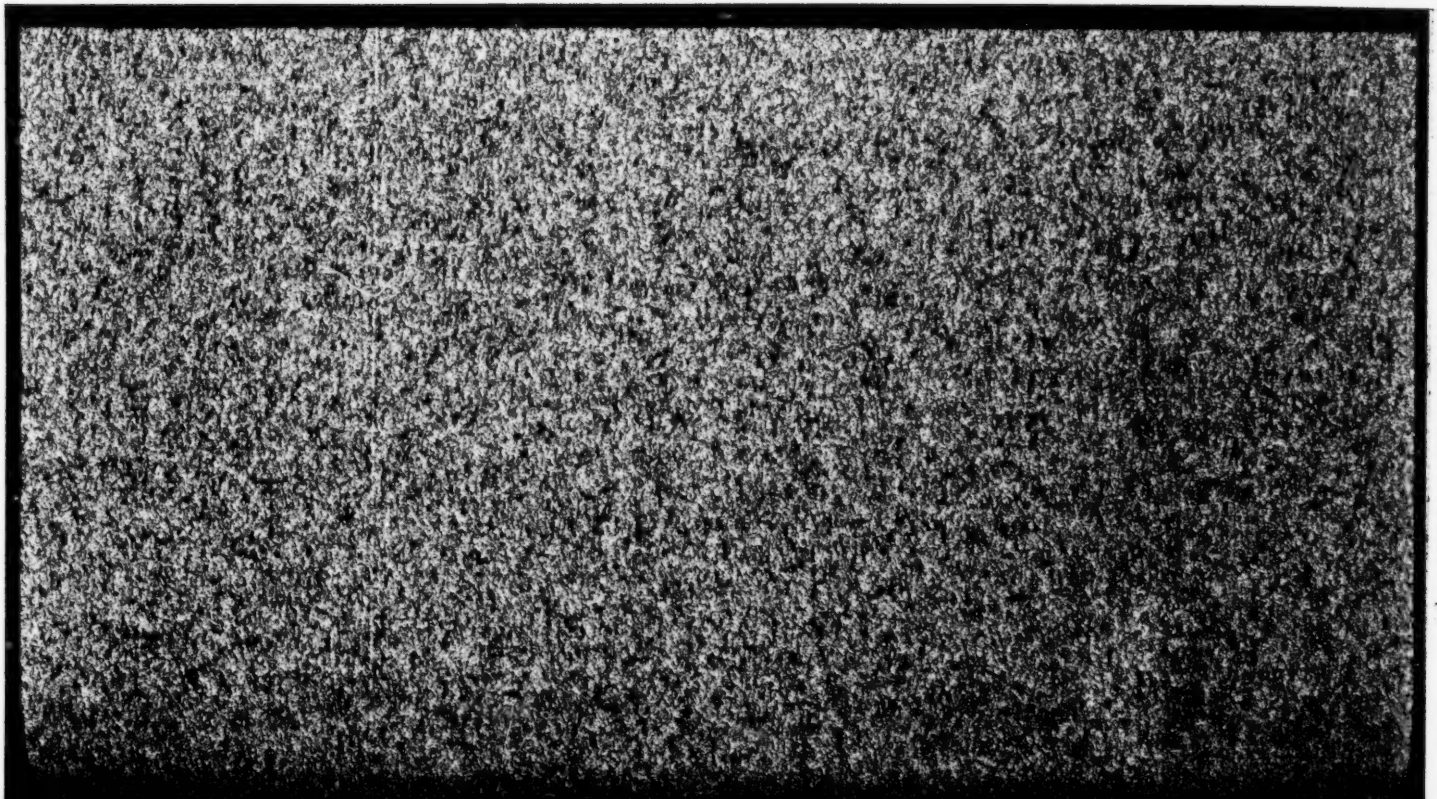
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 19, ORIGINAL

EX PARTE
L. W. BALDWIN AND GUY A. THOMPSON,
TRUSTEES, ET AL., *Petitioners*

RETURN TO RULE TO SHOW CAUSE



IN THE

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EX PARTE

L. W. BALDWIN AND GUY A. THOMPSON, TRUSTEES, ET AL., *Petitioners*

RETURN TO RULE TO SHOW CAUSE

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Now come The District Court of the United States for the Southern District of Texas, and Thomas M. Kennerly, United States District Judge for the said Southern District of Texas, and make and file the following return to the rule to show cause issued out of this Court in this cause on the 11th day of December, A. D. 1933:

1. They admit that the facts, as distinguished from the legal conclusions, stated in the petition for mandamus, heretofore filed in this cause, are true.

The application to the United States District Court for the Southern District of Texas for certiorari, for removal of the cause from the State Court to the United States District Court, was presented to and considered by the Court upon (a) Applicants' Petition for Removal

and Certiorari, and the Amendment and Supplement thereto, and (b) the Answer thereto by and in behalf of plaintiff in the State Court, containing copies of plaintiff's amended petition in the State Court and of the order of dismissal of so much of the same as sought an injunction in the State Court.

The said Petition for Removal and Certiorari, the Amendment and Supplement thereto and the Answer thereto, are correctly copied as exhibits to the petition for mandamus filed in this Court.

2. The decision of November 20, 1933, evidenced by the order of that date (Petition for Mandamus, pp.12-13), was made in deference to the decision, on November 15, 1933, of the United States Circuit Court of Appeals for the Fifth Circuit in the case of *Ruff v. Gay*, No. 7,008 on the docket of that Court.

3. They will abide the decision of this Court in the premises, having no interest in the controversy beyond the duty of judicial decision.

Respectfully submitted,

THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS,

THOMAS M. KENNERLY,
Judge Presiding.

ATTEST: (SEAL)

L. C. MASTERSON,
Clerk, United States District Court,
Southern District of Texas.

THOMAS M. KENNERLY,
United States District Judge,
Southern District of Texas.

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 19, ORIGINAL

EX PARTE: IN THE MATTER OF L. W. BALDWIN AND GUY A. THOMPSON, TRUSTEES, ET AL., PETITIONERS.

BRIEF IN SUPPORT OF PETITION FOR MANDAMUS

EDWARD J. WHITE,
FRANK ANDREWS,
ROBERT H. KELLEY,
Attorneys for Petitioners.

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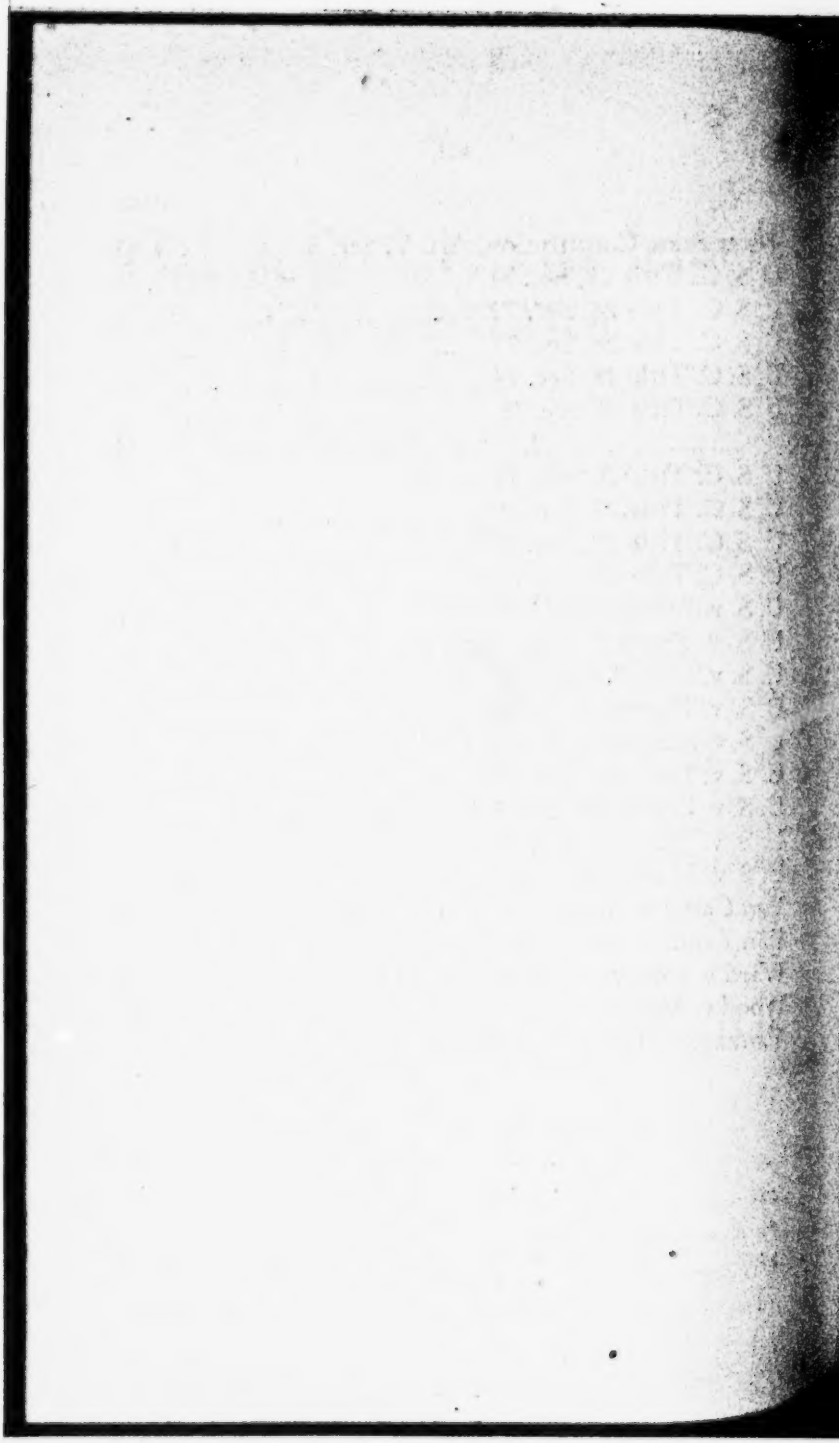

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. ....., ORIGINAL

EX PARTE: IN THE MATTER OF L. W. BALDWIN AND GUY A. THOMPSON, TRUSTEES, ET AL., PETITIONERS.

BRIEF IN SUPPORT OF PETITION FOR MANDAMUS

Preliminary Statement.

Tyrrell & Garth Investment Company, a joint stock association, by its first amended original petition filed in the District Court of Harris County, Sixty-First Judicial District of Texas, sues petitioners and another person, praying for the cancellation, as clouds upon its title, of certain right of way deeds for alleged breach of condition subsequent, for injunction to restrain petitioners from occupying or using the right of way described in the deeds, and for the recovery of large damages (Petn. for Mand., p. 63).

Petitioners, claiming to be officers of a Federal court,

and desiring to remove the suit into the United States District Court at Houston, Texas, which was then in session, presented to it their petition for removal and certiorari under Section 76 of Title 28, U. S. C. (Petn. for Mand., p. 16). The plaintiff in the suit, by its attorneys, opposed the removal and at the same time presented a so-called reply to the petition (Petn. for Mand., p. 57). To meet certain objections contained in this reply, petitioners also presented a supplemental and amended petition for removal (Petn. for Mand., p. 26). The matter was taken under advisement by the District Judge, Honorable Thomas M. Kennerly, on October 19, 1933 (Petn. for Mand., p. 12).

On November 20, 1933, on the authority of *Ruff v. Gay*, which had been decided by the Circuit Court of Appeals for the Fifth Circuit on November 15, the District Court denied the petition for removal and certiorari and returned the papers to counsel for petitioners (Petn. for Mand., P. 13).

Petitioners now pray (Petn. for Mand., p. 13) that this Court issue its writ of mandamus to compel the District Court to take jurisdiction of said suit, on removal.

POINT I.

ON THE FACE OF THE STATUTE THE SUIT IS REMOVABLE

On the question of removability the pertinent portions of the statute are as follows:

> "When any civil suit * * * is commenced in any court of a state * * * against any officer of the courts of the United States, for or on account of any act done under color of his office or in the performance of his duties as such officer * * * the said suit * * * may, at any time before the trial or final hearing thereof, be removed for trial, into the district court * * * in the district where the same is pending." Sec. 76, Title 28, U. S. C.

1—The Suit is a Civil Suit:

The amended petition filed in the State court (Petn. for Mand., p. 63) shows that the suit is a civil suit for injunction, damages, cancellation and removal of cloud. It has no aspect of a criminal prosecution. Article 504 of the Texas Code of Criminal Procedure reads:

> "The primary pleading in a criminal action on the part of the State is the indictment or information."

On the other hand, Article 1971 of the Revised Civil Statutes of Texas of 1925 reads:

> "Civil suits in the District and County Courts shall be commenced by a petition filed in the office of the Clerk."

2—The Suit was Commenced in a Court of a State:

The District Courts in Texas are courts of general

jurisdiction, provided for by Section 8 of Article 5 of the State Constitution, which, in part, declares:

> "The District Court shall have original jurisdiction * * * of all suits for trial of title to land, * * * of all suits, complaints or pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at or amount to five hundred dollars, exclusive of interest * * * and said Court and the judges thereof shall have power to issue writs of * * * injunction * * * and all writs necessary to enforce their jurisdiction."

In the so-called reply to the petition for removal, it was admitted (Petn. for Mand., p. 59) that the suit was filed and pending in the District Court of Harris County, Texas.

3—The Suit in the State Court is—

(a) against Officers of a Court of the United States;

(b) on Account of Acts Done under Color of their Office and in the Performance of their Duties as such Officers:

(a) The character of petitioners as officers of a Federal Court is alleged in plaintiff's amended petition in the State Court, was averred in detail in original and amended petitions for removal, and is again alleged in the petition for mandamus (Petn. for Mand., pp. 63, 18-22, 46, 50, 4-8). Petitioners Baldwin and Thompson are trustees in bankruptcy, appointed (Petn. for Mand., pp. 46, 50) under Section 77 of the Bankruptcy Act, as amended by the Act of March 3, 1933 (Public No. 420,

72d Congress), having powers and duties similar to those of a receiver in equity.

In *Isaacs v. Hobbs Tie and Timber Company*, 282 U. S. 734, this Court referred to trustees in bankruptcy as being "the Court's officers." Receivers appointed by a Federal equity court were held to be officers of the Court in *Barnette v. Bank*, 270 U. S. 438; *Newell v. Byram*, 26 Fed. (2d) 200 (C. C. A. 8), and *Ruff v. Gay*, unreported (C. C. A. 5).

(b) It appears from plaintiff's amended petition (Petn. for Mand., p. 63) that the claim asserted in the State court is:

That plaintiff's predecessor in title conveyed to petitioners' predecessor in title a right of way across its lands for a proposed interurban railroad upon condition that a passenger schedule be maintained "over the entire line on a regular schedule of at least one train not less than every two hours of each day from six o'clock a. m. until twelve o'clock midnight;" that petitioners, in the operation of the railroad subsequently constructed on this right of way, acting under the orders of the United States District Court at St. Louis (Petn. for Mand., pp. 46, 50, 32) breached this condition by failing to operate trains over the entire line; and since February, 1933, "the defendant railway companies wholly stopped, and they and defendant trustees, their agents and servants, have since said time ceased maintaining any passenger service * * * passing over the entire line of railway and over the rights of way herein described on a regular schedule of at least one train not less than every two hours of each day from six o'clock a. m. to twelve o'clock midnight; and have continued * * * a failure to maintain any service from six o'clock a. m. to nine-thirty a. m. or * * *

from one-thirty p. m. to five-thirty p. m. or * * * between nine-thirty p. m. to twelve midnight over the entire line or over the rights of way herein described" (Petn. for Mand., p. 76).

The corporate petitioners, having been directed by the bankruptcy court (Petn. for Mand., pp. 32 and 42) to run, manage and operate their railroads and property without trustee from May 2, 1933, until June 30, 1933, and the trustee petitioners, having been likewise authorized (Petn. for Mand., pp. 46, 50) with respect to the period on and after July 1, 1933, their arrangements of train schedules and train operations are clearly acts "done under color of their office" and "in the performance of their duties as such officers."

4—There has Been No Trial or Final Hearing in the State Court:

This was alleged in the petition for removal, was not denied, and is again alleged in the petition for mandamus (Petn. for Mand., pp. 18, 10).

5—The District Court For the Southern District of Texas, Houston Division, is "The District Court * * * in the District Where Same is Pending:"

The Houston Division of the Southern District of Texas includes the County of Harris (Section 189, Title 28, U. S. C.).

6—The Joinder of Harry K. Johnson as Co-Defendant Does not Preclude Removal:

In many cases decided prior to the 1916 amendment (39 Stat. 532), by which the benefits of Section 76, Title 28, U. S. C., were extended to officers of Federal

courts, it was held that the right of removal enjoyed under that and similar statutes was not affected by the joinder, as co-defendants, of other parties to whom the benefits of the statute did not extend. Among such decisions we cite: *Fisk v. Union Pacific R. Co.* (1869), 9 Fed. Cases No. 4827; *Fisher v. Daudistal* (1881), 9 Fed. 145; *Gallatin v. Sherman* (1896), 77 Fed. 337; *Ward v. Congress Construction Company* (1900), 99 Fed. 598. See also *Matter of Dunn*, 212 U. S. 374. As shown below (p. 42) the amendment of 1916 should be construed in the light of prior judicial interpretation of the law amended.

7—On the Face of the Statute, Therefore, The Suit is Removable to the District Court to Which the Petition For Removal Was Presented:

All of the statutory requirements are present. The suit is a civil suit; commenced in a court of a State; against officers of a court of the United States, for and on account of acts done under color of their office and in the performance of their duties as such officers; and, before the trial and final hearing thereof, a proper petition for removal was presented to the District Court in the district where the same is pending.

POINT II.

THE PROCEDURE ADOPTED FOR REMOVAL WAS IN CONFORMITY WITH THE STATUTE

The pertinent provisions of Section 76, Title 28, U. S. C., are:

> "* * * The said suit * * * may * * * be removed * * * upon the petition of such defendant (any officer of the courts of the United States) to said district court and in the following manner: Said petition shall set forth the nature of the suit * * * and be verified by affidavit and, together with a certificate signed by an attorney or counsellor at law of some court of record * * * of the United States, stating that as counsel for the petitioner he has examined the proceedings against him and carefully inquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said district court, if in session, or if it be not, to the clerk thereof at his office, and shall be filed in said office. The cause shall thereupon be entered on the docket of the district court and shall proceed as a cause originally commenced in that court * * *. When the suit is commenced in the State Court by * * * petition * * * the clerk of the district court shall issue a writ of certiorari to the State Court requiring it to send to the district court the record and the proceedings in the cause * * *, upon delivery of such process * * * shall be held to be removed to the district court * * *"

1—The Petition for Removal and Certiorari Set Forth the Nature of the Suit:

See petition for mandamus (pp. 16 and 26, 63).

2—It was Verified by Affidavit and Certified by Counsel as Provided in the Statute:

See petition for mandamus (pp. 24, 25).

3—The United States District Court Being in Session, the Petition was Presented to the Court:

The court was in session (Section 189, Title 28, U. S. C.; Petn. for Mand., p. 10). That the petition was presented to the Court is disclosed by the order of November 20, 1933 (Petn. for Mand., p. 12).

4—Instead of Entering the Order of Removal, Evidently Contemplated by the Statute, and Directing the Issuance of the Writ of Certiorari to the State Court, as by Statute Required, the Court, on the Authority of the Decision of the Circuit Court of Appeals for the Fifth Circuit in Ruff v. Gay, Denied the Relief Prayed for and Returned to Counsel for Petitioners the Papers Submitted, With its Order of Refusal Endorsed Thereon:

See petition for mandamus (pp. 12-13). Petitioners, of course, had no control over the action taken by the Court after they presented their petition for removal and the amendment thereto; but as far as they could control the proceedings, they complied with the requirements of the statute.

POINT III.

ON THE QUESTION OF REMOVABILITY THE STATUTE SHOULD BE CONSTRUED AS IT READS, AND AS INTERPRETED BY THIS COURT (BARNETTE V. WELLS FARGO NAT'L BANK, 270 U. S. 438) AND BY THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT (NEVELL V. BYRAM, 26 FED. (2d) 200); AND SHOULD NOT BE CONSTRUED AS IT WAS BY THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT (RUFF V. GAY, NO. 7008, DECIDED NOVEMBER 15, 1933).

1—There is a Conflict of Decisions:

In *Barnette v. Bank*, 270 U. S. 438, Mr. Justice Stone, speaking for this Court, said:

> "But an examination of the bill, which is set forth in the record, shows that the purpose of the suit was to recover land and funds then in charge of the receiver of a court in Alaska which was created by laws of Congress, and derived its powers and authority from those laws. *Such a suit was removable* under Section 28 of the Judicial Code (Comp. St. 1010), as supplemented by the amendment of Section 33 by the Act of August 23, 1916, c. 399, 39 Stat. 532 (Comp. St. Sec. 1015). Matarazzo v. Hustis (D. C.), 256 F. 882, 887-889; see Texas & Pacific Ry. Co. v. Cox, 12 S. Ct. 905, 145 U. S. 593, 603, 36 L. Ed. 829; Board of Commissioners v. Peirce (C. C.) 90 F. 764. The alleged right to recover grew out of transactions between the plaintiff and the receivers within the territory of Alaska with reference to land located in Alaska, *in all of which the receivers were acting in virtue of authority conferred on them as officers of the Alaska court.* Rouse v. Hornsby, 16 S. Ct. 610, 161 U. S. 588, 590, 40 L. Ed. 817." (Italics ours.)

In *Newell v. Byram*, 26 Fed. (2d) 200, Judge Sanborn, for the Circuit Court of Appeals for the Eighth Circuit said:

> "Receivers appointed by a court of the United States are officers of that court within the meaning of this statute" * * *
>
> "On November 27, 1926, the receivers presented their petition to the United States District Court below for the issuance of its writ of certiorari to the State Court, for a removal of this suit from that court to the United States court under and pursuant to Title 28, Sec. 76, U. S. C., above quoted. In their petition they alleged the commencement of the plaintiff's action against them as receivers, their appointment as receivers of the railroad by the court below, their possession and operation thereof under its orders at the time of the alleged injuries, and they attached to their petition and made a part of it the complaint of the plaintiff. The court below on November 27, 1926, issued the writ of certiorari and removed the case to the Federal court. On December 10, 1926, the plaintiff made a motion to remand the case to the State Court, and filed an answer to the petition for the writ of certiorari, in which she alleged that it appeared from her complaint, and the fact was, that her cause of action 'is based upon common law negligence of said defendants, and each of them.'" * * *
>
> "The removability of actions of this character under Section 33 of the Judicial Code has been generally sustained in the courts of the United States, since the decision of the cases of Matarazzo v. Hustis (1919 D. C.) 256 F. 882, 887; Barnette v. Wells Fargo Nat. Bank, 270 U. S. 438, 441, 46 S. Ct. 326, 70 L. Ed. 669, and Berens, Jr., v. Byram, et al., Receivers, 26 F. (2nd) 953, opinion of Hon. Jas. D. Elliott, United States District Judge, South Da-

kota, filed May 27, 1927. There have been many other decisions of the United States District Courts to the same effect, which have not been printed or published."

But in *Ruff v. Gay* (Nov. 15, 1933, unreported), the Circuit Court of Appeals for the Fifth Circuit, through Judge Hutcheson, relying upon "the settled policy" of Congress and upon certain congressional proceedings and reports, rather than upon the plain language of the statute, sustained the contention of the appellant that *"the invoked section applies only to actions and proceedings brought personally against the receiver; that is, to hold him responsible in his own person or property."* To sustain this conclusion, the Court stated that for fifty years the policy of Congress, particularly in regard to actions against receivers, had been "to restrict, not to enlarge, federal jurisdiction." It also said:

> "To us it seems bizarre and fanciful to say that by an amendment of three lines, tucked away in a section of the Code relating entirely to the removal of suits and prosecutions against revenue officers, and officers of the Congress, a section having no relation whatever to receivers nor even generally to removals, it was intended to make a secret breach in the removal laws. * * * we are left in no doubt that 'the mischief and defect' for which the statute, before its amendment, did not provide, was not the failure of the statute to authorize receivers to remove actions, 'against the corporation in their name' into the Federal court; it was the failure of the statute to extend to officers of the United States courts the privilege of removal which before only revenue officers, and persons acting for them, and for the Congress, had enjoyed. Maryland *v.* Soper, 270 U. S. 9; Smith v. U. S. 58 Fed. (2d) 735;

Davis v. S. Carolina, 107 U. S. 597. Had the Congress been intending to remove the mischief which the trial court thought the amendment aimed at, that receivers could not remove into Federal courts suits 'against the corporation by name in the hands of or in the possession of the receiver,' McNulta v. Lockridge, *supra*. Had that been 'the true reason of the remedy' no statute more unsuited to afford the remedy because more unrelated to the mischief could have been chosen for amendment, unless indeed the Congress had the intention to make an unsuspected breach in the removal laws, by hiding that breach away in a secret place.

"But we are not left to construction to determine what its real intention was. Introduced first in the House on April 6, 1916, as H. R. 14299, the amendment was immediately referred to the House Committee on the Judiciary. On May 27 it was reported back without amendment, accompanied by H. R. 776, Vol. 3. In the light of this report the construction the trial court put on this statute, unreal enough without it, appears yet more unreal. It declared that 'outside of typographical corrections, the bill is a recital of the old law, with only one change' by which the words 'or against any officer of the courts of the United States for or on account of any act done under color of his office, or in the performance of his duties as such officer' are intended to be inserted. 'The purpose of the amendment' says the Report, is 'to extend the provisions of Sec. 33 uniformly to officers of the courts of the United States not only in cases arising under the revenue laws, but in all cases, giving to them the same protection in all cases now given to officers acting under the revenue laws and to officers of the Congress. The omission of such provision from the original Act gives rise to certain incongruities and creates a want of uniformity in the provisions of the law.' The statute, with the proposed amend-

ment, does not extend in any degree the jurisdiction or the powers of the courts of the United States. It merely provides a more orderly method of procedure which inures as much, in fact more, to the benefit of the States than to the benefit of the United States, because it substitutes for the writ of habeas corpus the right of removal, so that instead of a summary discharge under the habeas corpus proceedings the amendment provides for a trial before a court and jury. * * * It will be observed therefore, that the effect of the proposed amendment does not increase or enlarge the jurisdiction of the Federal Courts, and is confined solely to giving to the officers of the Federal Courts, in case of prosecution in their official capacity, a regular and orderly right of removal from the State to the Federal Court, instead of compelling such officers to resort to the present remedy by writ of habeas corpus, which would require the officers to go into custody in order to obtain the writ.'

"Without discussion or amendment in either House or Senate, the bill as thus reported was passed. * * * '"

It then undertook (we think unsuccessfully—see *infra*, pp. 76-79) to distinguish the decision of this Court in *Barnette v. Bank*, 270 U. S. 438, saying:

"Aside from the fact that the holding of the majority opinion, that in the absence of a showing in the record as to the real ground of the removal, it might be assumed that the suit was properly removed under Sec. 33 as amended, was, because of the absence of such showing, a purely supposititious one, and therefore not binding as a precedent, it can not be determined what the case actually held on the point under discussion here, since it does not appear whether the suit was against the receiver

personally, or 'against the corporation in his name'."

The opinion concludes with the statement that—

"The section invoked by the receiver is without application to this suit; the remand was improperly denied, the suit improperly dismissed."

The judgment of the District Court was thereupon reversed with directions to set aside the dismissal and remand the cause to the State court.

There is, therefore, a clear conflict of decision, on the application of the statute and on the removability of the suit, between the Circuit Court of Appeals for the Fifth Circuit, on one hand, and this Court and the Circuit Court of Appeals for the Eighth Circuit, on the other hand; and with the latter the decision in *Snider v. Sand Springs Ry. Co.*, 62 Fed. (2d) 635, seems to place the Circuit Court of Appeals for the Tenth Circuit.

And the conflict of opinion arises on this question: Should a statute, plain and clear upon its face, be construed according to the natural import of its terms, or should extraneous matter be searched out and resorted to in order that an ambiguity which is not apparent should be first created and then resolved contrary to the language of the statute?

2—Where a Statute is Plain on its Face, there is no Room for Construction:

The statute declares—

"When *any* civil suit * * * is commenced in *any* Court of a State * * * against *any* officer of the Courts of the United States for or on account of

> *any* act done under color of his office or in the performance of his duties as such officer * * * *the said suit* * * * may * * * be removed for trial into the district court * * * " (Italics ours.)

In *Barnette v. Bank*, 270 U. S. 438, Mr. Justice Stone, for this Court, held that a suit to recover land in the custody of a receiver of a Federal court "was removable under" the section quoted from above. He evidently read the statute, and the other members of the Court evidently read the statute, in the light of its natural import. So did the Circuit Court of Appeals for the Eighth Circuit in *Newell v. Byram*, 26 Fed. (2d) 200; and so did the Circuit Court of Appeals for the Tenth Circuit in *Snider v. Sand Springs Ry. Co.*, 62 Fed. (2d) 635. But in *Ruff v. Gay* the Court of Appeals for the Fifth Circuit holds that the section "applies only to actions and proceedings brought personally against the receiver; that is, to hold him responsible in his own person or property." With due respect to that Court, the decision seems utterly untenable.

In *United States v. Shreveport Grain & E. Company*, 287 U. S. 77, the United States appealed from an order of the District Court quashing an indictment which charged misbranding of packages of food by labeling each as containing a greater quantity than it in fact contained. The following rule of statutory construction was stated:

> "Our attention is called to the fact that the House Committee on Interstate and Foreign Commerce, in reporting the bill which afterwards became the act in question (H. R. 850, 62d Cong. 2d Sess., pp. 2-4), agreed with the view that the authority to make rules and regulations was confined to the

establishment of tolerances and exemptions; and that the Senate Committee on Manufactures (S. R. 1216, 62d Cong. 3d Sess., pp. 2-4), reported to the same effect. In proper cases, such reports are given consideration in determining the meaning of a statute, *but only where that meaning is doubtful. They cannot be resorted to for the purpose of construing a statute contrary to the natural import of its terms.*. Railroad Commission v. Chicago, B. & Q. R. Co., 257 U. S. 563, 588, 589, 66 L. Ed. 371, 383, 384, 22 A. L. R. 1086, 42 S. Ct. 232; Pennsylvania R. Co. v. International Coal Min. Co., 230 U. S. 184, 199, 57 L. Ed. 1446, 1452, 33 S. Ct. 893, Ann. Cas. 1915A, 315; George Van Camp & Sons Co. v. American Can Co., 278 U. S. 245, 253, 73 L. Ed. 311, 313, 60 A. L. R. 1060, 49 S. Ct. 112. Like other extrinsic aids to construction *their use is 'to solve, but not to create, an ambiguity.'* Hamilton v. Rathbone, 175 U. S. 414, 421, 44 L. Ed. 219, 222, 20 S. Ct. 155. Or, as stated in United States v. Hartwell, 6 Wall. 385, 396, 18 L. Ed. 830, 832, *'If the language be clear it is conclusive. There can be no construction where there is nothing to construe.'* The same rule is recognized by the English courts. In Rex v. Navigation Comrs., 5 Ad. & El. 804, 816, 111 Eng. Reprint, 1370, Lord Denman, applying the rule, said that the court was constrained to give the words of a private act then under consideration an effect which probably was 'never contemplated by those who obtained the act, and very probably not intended by the legislature which enacted it. But our duty is to look to the language employed, and construe it in its natural and obvious sense.' See also United States v. Lexington Mill & Elevator Co., 232 U. S. 399, 409, 58 L. Ed. 658, 661, L. R. A. 1915B, 774, 34 S. Ct. 337; Caminetti v. United States, 242 U. S. 470, 485, 61

L. Ed. 442, 452, L. R. A. 1917F, 502, 37 S. Ct. 192, Ann. Cas. 1917B, 1168."

This is one of the most recent decisions of this Court. While clearly framed, it only serves to reaffirm a line of decisions almost as long as the history of this Court.

United States v. Fisher, 2 Cranch 358, decided in 1804, opinion by Chief Justice Marshall, involved the question whether the United States as the holder of a protested bill of exchange which had been negotiated in the ordinary course of trade, was entitled to a preference over general creditors where the debtor had become bankrupt. The decision depended upon the proper construction of the fifth section of the Act of March 3, 1797, which in part read:

> "Any revenue officer or other person hereafter becoming indebted to the United States by bond or otherwise * * * "

It was contended that this section related only to those debtors who had received public money. The Court found that the title of the Act and the first four sections thereof plainly related to receivers of public money. The defendant pointed to "the michiefs to result from the construction upon which the United States insists." The Court held that if the meaning of the legislature was plain it must be obeyed, even though great inconvenience might result; that "where the intent is plain, nothing is left to construction;" that "the natural sense of words is not to be disregarded, because that which they import might have been better or more directly expressed;" that where political regulations are made which might be inconvenient, "it would be going a great way that a constrained interpretation

must be put upon them to avoid an inconvenience which ought to have been contemplated in the legislature when the act was passed." The Court held that the statute meant what it said, and that it embraced the debt involved in the suit.

Merritt v. Welsh, 104 U. S. 694, was a suit to recover back duties exacted by the collector of the Port of New York on certain sugar which had been imported. Under the statute, the duties were based upon the Dutch standard of color. The collector contended that while the Dutch standard was named in the statute, that, nevertheless the intent of the law was to adopt it as a standard of quality, and that where modes of manufacture changed and it ceased to be such a test, the reason of the rule ought to prevail and quality ought to still be the test. The Court said that the reasoning would be very good if the law prescribing the standard was not explicit in its terms, that whatever was in the minds of the legislature, the intent must be sought from the words they had used, and that if they were clear the Court need go no further.

Board of Lake County Commissioners v. Rollins, 130 U. S. 662, was a suit against Lake County, Colorado, on a large number of county warrants issued for ordinary county expenses. The county defended on the ground that the County Commissioners had no authority to issue the warrants in question under Section 6, Article II, of the Constitution of Colorado. The proper construction of this section of the Constitution was the only point involved. It provided in part that "the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption

of the Constitution, shall not at any time exceed twice the amount above herein limited." The trial court held that this section of the Constitution placed a limit on the power of the county to incur indebtedness by contract, but that it did not affect its liability for further amounts in the shape of fees and salaries. This Court said:

> "We are unable to adopt the constructive interpolations ingeniously offered by counsel for defendant in error. Why not assume that the framers of the Constitution, and the people who voted it into existence, meant exactly what it says? At the first glance, its reading produces no impression of doubt as to the meaning. It seems all sufficiently plain; and in such case there is a well settled rule which we must observe. The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself; and when the text of a constitutional provision is not ambiguous the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument.
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> "To get at the thought or meaning expressed in a statute, a contract or a constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning, which involves no absurdity nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it. Newall v. People, 7 N. Y. 97; Hills v. Chicago, 60 Ill. 86; Denn v. Reid, 35 U. S. 10 Pet. 524 (9:519); Leonard v. Wiseman, 31 Md. 204; People v. Potter, 47 N. Y. 375; Cooley Const. Lim., p. 57; Story Const.

Sec. 400; Beardstown v. Virginia, 76 Ill. 34. So, also, where a law is expressed in plain and unambiguous terms whether those terms are general or limited, the Legislature should be intended to mean what they have plainly expressed, and consequently. no room is left for construction. United States v. Fisher, 6 U. S. 2 Cranch, 358, 399 (2:304, 317); Doggett v. Florida R. Co. 99 U. S. 72 (25:301)." (l. c. 1063.)

United States v. Ewing, 184 U. S. 140, was an appeal from a judgment of the Court of Claims awarding petitioner $1,264 in a readjustment of his salary as postmaster under a statute enacted in 1883. The pertinent part of the Act and the holding of the Court with respect thereto are stated in the following excerpt from its opinion:

"Having stated the circumstances in which a readjustment could be had, the act of 1883 proceeded to state from what period such readjustment should take effect, and it stated that it was 'to date from the beginning of the quarter succeeding that in which such sworn returns of receipts and business or quarterly returns were made.' This language is plain and unambiguous, and the court is bound by its terms. The readjustment cannot take effect in the same term for which the sworn returns were reviewed. It is postponed to the beginning of the next quarter.

"It is said that as thus construed the statute leads in many cases to great injustice, and hence such construction should not be adopted. The difficulty is that any other construction violates the clear directions of the law, and although the result may be to withhold its benefits from some who might be regarded as otherwise entitled to it, yet we cannot for that reason alter its terms so as to in-

clude them, and thus ourselves enact instead of construing the law."

That was an Act whose plain terms *denied* certain rights to a Federal officer. This Court adhered to the language of the Act in applying it. Here, the plain terms of Section 76 *give* certain rights to Federal officers. *Its* language, also, should be adhered to.

Pennsylvania Railroad Company v. International Coal Mining Company, 230 U. S. 184, was a suit by the coal company to recover damages from the railroad company because of rebates allowed to other shippers. The proper interpretation of Section 8 of the Act to Regulate Commerce was involved, and in support of its position plaintiff referred to a statement made by a member of the Senate Conference Committee when the bill was before Congress. The court held that "not even formal reports—much less the language of a member can be resorted to for the purpose of construing a statute contrary to its plain terms."

United States v. Lexington Mill and E. Co., 232 U. S. 399, was an action under Section 10 of the Food and Drugs Act to condemn certain flour as adulterated. It was also contended that the flour was adulterated and misbranded under Section 7 of that statute. The court said:

> "Applying these well known principles in considering this statute, we find that the fifth subdivision of Sec. 7 provides that food shall be deemed to be adulterated, 'if it contain any added poisonous or other added deleterious ingredient *which may render such article injurious to health.*' The instruction of the trial court permitted this statute

to be read without the final and qualifying words, concerning the effect of the article upon health. If Congress had so intended, the provision would have stopped with the condemnation of food which contained any added poisonous or other added deleterious ingredient. In other words, the first and familiar consideration is that, if Congress had intended to enact the statute in that form, it would have done so by choice of apt words to express that intent".

United States v. First National Bank, 234 U. S. 245, opinion by Mr. Justice Day, was a suit by the United States to set aside certain conveyances of land in the White Earth Indian Reservation in Minnesota. In 1867, the reservation had been set aside to the Chippewa Indians, and provision had been made for the certification to each Indian of 160 acres of land with the proviso that the property could not be alienated except upon approval of the Secretary of the Interior. By statute enacted on February 8, 1887, an allotment of the land in severalty was authorized, together with the issuance of patents covering the same, with the further proviso that the lands were held by the United States in trust for the Indians for a period of twenty-five years. By the so-called "Clapp Amendment" adopted in 1906-7, the restrictions on alienation with respect to Indians of mixed blood were removed, but as to Indians of the full blood approval of the Secretary of the Interior was still required before such a sale could be made. The sales involved were made by Indians with a very small percentage of white blood. The Government contended that "mixed blood" meant those Indians of one-half white blood or more than one-half white blood. This court held that the term "mixed blood" would be given its usual

and ordinary meaning; that congressional committee reports showing the after effects of legislation could have little weight in determining their meaning, and certainly could not overcome the meaning of the plain words which had been used; that disastrous results flowing from the legislation when given its natural meaning could not influence the courts in administering the law; that "the responsibility for the justice or wisdom of legislation rests with the Congress, and *it is the province of the court to enforce, not to make, the laws;*" that "the policy of the government in passing legislation is often an uncertain thing, as to which varying opinions may be formed, and may, as is the fact in this case, afford an unstable ground of statutory interpretation." It was further said:

> "The conviction is very strong that if Congress intended to remove restrictions only from those who had half white blood or more, it would have inserted in the act the words necessary to make that intention clear; that is, we deem this a case for the application of the often expressed consideration, aiding interpretation, that if a given construction was intended, it would have been easy for the legislative body to have expressed it in apt terms."

Mackenzie v. Hare, 239 U. S. 299, opinion by Mr. Justice McKenna, was a mandamus proceeding to compel the election commissioners of San Francisco to register petitioner as a qualified voter. Petitioner had married an alien who lived in California and was making, and intended to make, California his permanent residence. A statute passed in 1907 provided "that *any* American woman who marries a foreigner shall take the nationality of her husband". The petitioner contended that the Act was not intended to deprive an American

woman, who married a foreigner and remained within the jurisdiction of the United States, of her citizenship. The Court said:

> "Does the act invite or permit such assistance? Its declaration is general, 'that any American woman who marries a foreigner shall take the nationality of her husband.' There is no limitation of place; there is no limitation of effect, the marital relation having been constituted and continuing. For its termination there is provision, and explicit provision. At its termination she may resume her American citizenship if in the United States by simply remaining therein; if abroad, by returning to the United States, or, within one year, registering as an American citizen. The act is therefore explicit and circumstantial. It would transcend judicial power to insert limitations or conditions upon disputable considerations of reasons which impelled the law, or of conditions to which it might be conjectured it was addressed and intended to accommodate.
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> "Whatever was said in the debates on the bill or in the reports concerning it, preceding its enactment or during its enactment, must give way to its language; or, rather, *all the reasons that induced its enactment and all of its purposes must be supposed to be satisfied and expressed by its words*, and it makes no difference that in discussion some may have been given more prominence than others, seemed more urgent and insistent than others, presented the mischief intended to be remedied more conspicuously than others" (Italics ours).

Caminetti v. United States, 242 U. S. 470, was a prosecution under the White Slave Act of 1910. Caminetti was indicted for transporting a woman from Sacramento to Reno for the purpose of debauchery, it be-

ing shown that she became his mistress and concubine. He based his defense on the proposition that the Act of Congress was intended to reach only *commercialized* vice. The familiar rule, that the statute meant what it said, was followed; and the Court refused to alter or vary that meaning by referring to committee reports, the caption of the Act, or to what was said by members of Congress while the statute was under consideration. The statute there involved used the expression "any person"; that here involved uses the terms "any officer" and "any civil suit."

Railroad Commission v. C. B. & Q., 257 U. S. 563, cited with approval in *United States v. Louisiana*, 54 Sup. Ct. Rep. (Adv. Ops.) 28, 31, required an interpretation of Sec. 13 of the Interstate Commerce Act. It was contended that the statute was not intended to confer upon the Interstate Commerce Commission the power to remove every discrimination against interstate commerce, and in support of this view committee reports and explanatory statements of members of Congress were cited. This Court held that *"such aids are only admissible to solve doubt, and not to create it."*

Standard Fashion Company v. Magrane Houston Co., 258 U. S. 346, was a suit to restrain respondent from violating a certain contract for the sale of patterns. The contract contained an agreement that the respondent would not sell or permit to be sold on its premises any other patterns during the term of the contract. Respondent based its defense on Section 3 of the Clayton Act which prohibited any contract of sale containing an agreement that the purchaser should not deal in the goods of a competitor where the effect of the agreement was to substantially lessen competition. The

Court refused to consider committee reports in interpreting the Act, saying that its terms were plain and that it constituted a defense to the suit.

In *Mason v. United States*, 260 U. S. 545, the President had made an order withdrawing certain lands from settlement and re-entry. It was contended that the order did not embrace appropriations under the mining laws. The Court held that the meaning of the order was plain; that there was no room for construction; and it refused to apply certain rules of interpretation insisted upon by Mason and which might well have governed had ambiguities existed.

Russell Motor Car Company v. United States, 261 U. S. 514, involved a statute which empowered the President "to modify, suspend, cancel or requisition any existing or future contract for the building, production or purchase of ships or material." The Motor Car Company had made an agreement with the government to supply it with anti-aircraft guns at an agreed price. Pursuant to the statute, the contract was cancelled. The Motor Car Company sued, contending that the section of the statute above quoted related only to *private* contracts and did not authorize the government to cancel *its own* contracts. This Court held that the words "any existing or future contract" should be read with literal exactness; that they included *all* contracts, whether private or governmental; that rules of statutory construction have no place except in the domain of ambiguity; that the statute meant what it said; and that the President was authorized to cancel the contract. Here, again, there will be observed the strict analogy between the expression "*any* contract" and the

phrase "*any* civil suit against *any* officer" of the Federal courts.

Commissioner of Immigration v. Gottlieb, 265 U. S. 310, was a habeas corpus proceeding in which the trial court had directed the discharge of the wife and child of a Jewish rabbi who had been refused admission into the United States. The proper interpretation of an Act of Congress relating to such admissions, presented the only point discussed. The case is cited primarily as an indication of the extent to which the courts go in reading statutes literally, rather than because the facts make the case in point. The court held that the case was one of "peculiar and distressing hardship", but that the words of the statute left no room for construction; that the courts had no choice but to follow it without regard to consequences; that under the Act the respondents were not entitled to admission, and accordingly it reversed the decisions below.

Van Camp v. American Can Company, 278 U. S. 245, opinion by Mr. Justice Sutherland, involved the construction of Section 2 of the Clayton Act (Section 13, Title 15, U. S. C.). The Court said:

> "These facts bring the case within the terms of the statute, unless the words 'in any line of commerce' are to be given a narrower meaning than a literal reading of them conveys. The phrase is comprehensive, and means that if the forbidden effect or tendency is produced in *one* out of *all* the various lines of commerce, the words 'in *any* line of commerce' literally are satisfied. The contention is that the words must be confined to the particular line of commerce in which the discriminator is engaged, and that they do not include a different

line of commerce in which purchasers from the discriminator are engaged in competition with one another. In support of this contention, we are asked to consider reports of congressional committees and other familiar aids to statutory construction. But the general rule that 'the province of construction lies wholly within the domain of ambiguity' (Hamilton v. Rathbone, 175 U. S. 414, 419, 421, 44 L. Ed. 219, 221, 222, 20 Sup. Ct. Rep. 155), is too firmly established by the numerous decisions of this court either to require or permit us to do so. The words being clear, they are decisive. There is nothing to construe. To search elsewhere for a meaning either beyond or short of that which they disclose is to invite the danger, in the one case, of converting what was meant to be open and precise, into a concealed trap for the unsuspecting, or, in the other, of relieving from the grasp of the statute some whom the legislature definitely meant to include. Decisions of this court, where the letter of the statute was not deemed controlling and the legislative intent was determined by a consideration of circumstances apart from the plain language used, are of rare occurrence and exceptional character, and deal with provisions which, literally applied, offend the moral sense, involve injustice, oppression or absurdity (United States v. Goldenberg, 168 U. S. 95, 103, 42 L. Ed. 394, 398, 18 Sup. Ct. Rep. 3), or lead to an unreasonable result, plainly at variance with the policy of the statute as a whole (Ozawa v. United States, 260 U. S. 178, 194, 67 L. Ed. 199, 207, 43 Sup. Ct. Rep, 65). Nothing of this kind is to be found in the present case."

Here also it may safely be affirmed that "nothing of this kind is to be found in the present case."

United States v. Missouri P. R. Co., 278 U. S. 269, 277, involved the construction of paragraph (4) of Sec-

tion 15 of the Interstate Commerce Act (Section 15, Title 49, U. S. C.). Mr. Justice Butler, speaking for this Court, said:

> "The language of that provision is so clear and its meaning so plain that no difficulty attends its construction in this case. Adherence to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by the words employed, and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. It is elementary that where no ambiguity exists there is no room for construction. Inconvenience or hardships, if any, that result from following the statute as written, must be relieved by legislation. It is for Congress to determine whether the Commission should have more authority in respect of the establishment of through routes. Construction may not be substituted for legislation. * * *
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> " * * * Where doubts exist and construction is permissible, reports of the committees of Congress and statements by those in charge of the measure and other like extraneous matter may be taken into consideration to aid in the ascertainment of the true legislative intent. But where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed."

As "it is for Congress to determine whether the Commission should have more authority," likewise it is for Congress to determine whether the United States District Courts shall have more authority, originally or on removal.

In *United States v. Felt and Tarrant Mfg. Co.*, 283 U. S. 269, respondent was allowed a recovery, by the Court of Claims, of income and excess profit taxes alleged to have been illegally exacted. The statute required the filing of a claim or demand as a prerequisite to suit. This Court reversed the judgment since no such claim was filed, saying that "it is not within the judicial province to read out of the statute the requirement of its words."

Old Colony Railroad Company v. Commissioner of Internal Revenue, 284 U. S. 552, was decided on certiorari to review a decision of the United States Board of Tax Appeals that certain bond premiums received by the taxpayer did not constitute taxable income. An interpretation of the phrase "all interest * * * on its indebtedness," contained in Section 234 of the Revenue Act of 1921, was necessary to the decision. The Court said:

> "In other words, the contention is that by the use of the quoted phrase the statute did not intend to allow the deduction of the amount agreed to be paid, which the contract denominates 'interest', but of a different sum to be ascertained by a calculation which will allocate the payment between a partial and ratable return of the premium and 'effective' interest on the par of the security.
>
> "Is this the reasonable construction of the language of the act; 'all interest * * * on its indebtedness'? The rule which should be applied is established by many decisions. 'The legislature must be presumed to use words in their known and ordinary signification'. Levy's Lessee v. M'Cartee, 6 Pet, 102, 110, 8 L. Ed. 334. 'The popular or received import of words furnishes the general rule for the interpretation of public laws.' Maillard v.

Lawrence, 16 How. 251, 261, 14 L. Ed. 925. And see United States v. Buffalo Gas Co., 172 U. S. 339, 341, 19 S. Ct. 200, 43 L. Ed. 469; United States v. First Nat. Bank, 234 U. S. 245, 258, 34 S. Ct. 864, 58 L. Ed. 1298; Caminetti v. United States, 242 U. S. 470, 485, 37 S. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502 Ann. Cas. 1917B, 1168."

Lynch v. Allworth-Stevens Company, 267 U. S 364, was a suit to recover an alleged illegally exacted income tax. Whether or not the respondent was entitled to a depletion allowance under the provisions of an Act of Congress, was the only point presented. The Act permitted "a reasonable allowance for the exhaustion of property arising out of its use." Respondent was the *lessee* of certain ore bodies. The claim of the collector was that such an allowance could be granted only to the *owner* of the land. This Court held that there was nothing to suggest that the word "property" was used in any limited sense; and it said that *the "plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover."*

We submit that the construction placed on Section 76 in the Fifth Circuit is not "the plain, obvious and rational meaning of the statute" but that it involves a "curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover." For this reason, the interpretation of the statute in the Fifth Circuit stands opposed not only to the decision of this Court in *Barnette v. Bank*, 270 U. S. 438, but also to

the other decisions cited above. See also *Fidelity & Deposit Co. v. Arenz*, 54 Sup. Ct. Rep. (Adv. Ops.) 16.

3—The History of the Statute:

The opinion of the Circuit Court of Appeals in *Ruff v. Gay* briefly adverts to the history of the statute and to the congressional policy of the past fifty years and, partly on such grounds, undertakes to construe the statute contrary to the decisions of this and other courts, and contrary to the natural import of its terms.

The history of this statute is not compassed by the past fifty years; nor even by the past hundred years; and when that history is fully developed, it impels a conclusion very different from that reached in *Ruff v. Gay*.

The Judiciary Act of 1789 (1 Stat. 73) provided for removals from State courts into Federal courts in three instances only: (a) in suits against aliens; (b) in suits by a citizen of the State in which the suit was brought against a citizen of another State; and (c) in suits for land claimed under grants from different States. The procedure for removing these cases was substantially that which is now provided (Section 72, Title 28, U. S. C.) in ordinary cases of removal; namely the presentation to the State court of a petition for removal with security for costs.

Section 76, Title 28, U. S. C., appears to have had its genesis in the Act of February 4, 1815, which was plainly one enacted to further the successful prosecution of the War of 1812 (3 Stat. 195). This Act permitted the removal from State Courts to the Circuit Courts of the Union of suits and prosecutions against "any collector, naval officer, surveyor, inspector or any other officer, civil or military, or any other person aiding or assisting, agreeable to the provisions of this Act, or under color

thereof, for anything done or omitted to be done as an officer of the customs, or for anything done by virtue of this Act or under color thereof."

The procedure for removal provided in this Act was substantially that required by the Judiciary Act of 1789, and by the present statute concerning ordinary removals (Section 72, Title 28, U. S. C.).

So solicitious was the Congress that the officers named in this Act might have the benefit of trial in the courts of the Union that it was further provided that even after final judgment in the State Court an appeal or writ of error could be sued out to the Circuit Court where the case would be tried anew, on the facts as well as the law.

This Act, by its terms, was doomed to expire at the termination of the war. It was substantially re-enacted, however, in the Act of March 3, 1815 (3 Stat. 231), which, being also a temporary measure, was extended by the Act of March 3, 1817 (3 Stat. 396), for an additional four years.

In November, 1832, an ordinance of nullification was adopted by the people of South Carolina in the Columbia convention. This ordinance was aimed at the revenue laws of the United States then in force. Shortly thereafter the Legislature of South Carolina enacted certain rigorous laws designed to enforce that ordinance. Among other weapons intended to defeat the enforcement of the revenue laws was a provision prohibiting appeals and writs of error to the Federal Courts under pain of criminal punishment, and forbidding the State courts from giving any copy of the record for that purpose.

In his message to the Congress of January 16, 1833 (III Messages and Papers of the Presidents, 1173),

President Jackson, after reviewing the ordinance of nullification and the statutes passed in aid thereof, declared:

> "If these measures cannot be defeated and overcome by the power conferred by the Constitution on the Federal Government, the Constitution must be considered as incompetent to its own defense, the supremacy of the laws is at an end and the rights and liberties of the citizens can no longer receive protection from the government of the Union. * * * The whole revenue system of the United States in South Carolina is obstructed and overthrown, and the government is absolutely prohibited from collecting any part of the public revenue within the limits of that state."

Referring to "those aggressions upon the authority of Congress which, by the ordinance are made part of the fundamental law of South Carolina" the President declared:

> "They offer to the United States no alternative but unconditional submission * * *.
>
> "In this posture of affairs the duty of the government seems to be plain. It inculcates a recognition of that State as a member of the Union and subject to its authority, a vindication of the just power of the Constitution, the preservation of the integrity of the Union, and the execution of the laws by all constitutional means."

Was there here evident any design to afford any personal protection to any officer of the Government except as that may have been incidental to the preservation of the Union and the exercise of its right to enforce its laws? The President in the same message later referred to the particular means by which the people of

South Carolina had undertaken to prevent the collection of the Federal revenues. He did not refer to the best means of giving personal protection to Federal officers, but instead he considered "the best means of avoiding or of preventing the apprehended obstruction to the collection of the revenue." His recommendation was:

> "It may therefore be desirable to revive, with some modifications better adapted to the occasion, the sixth section of the act of the 3d March, 1815 * * * and to provide that in any case where suit shall be brought against any individual in the courts of the State for any act done under the laws of the United States he should be authorized to remove the said cause by petition into the circuit court of the United States without any copy of the record, and that the court should proceed to hear and determine the same as if it had been originally instituted therein * * *
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> "*Provisions less than these*, consisting as they do for the most part rather of a revival of the policy of former acts called for by the existing emergency than of the introduction of any unusual or rigorous enactments, *would not cause the laws of the Union to be properly respected or enforced.* It is believed these would prove adequate. * * *"

The President stated that our fathers had—

> "bequeathed to us a government of laws and a Federal Union founded upon the great principle of popular representation. * * * *We are called to decide whether these laws possess any force and that Union the means of self-preservation*" (Italics ours).

Responsive to the recommendation contained in this message, the Congress passed and the President approved the Act of March 2, 1833 (4 Stat. 633), in which, for the first time, we find a provision for the removal of suits into the Federal court by Federal officers by presenting their petition for removal to the Federal court itself, without bond and without reference to the amount in controversy. This Act also provides that if the Circuit Court should be in session, the petition for removal should be presented to it; but if not in session, to the Clerk, who was to issue a writ of certiorari to bring up the record from the State court; and that upon the service of that writ on the clerk of the State court, the suit was to be regarded as removed into the Circuit Court "and any further proceedings, trial or judgment therein in the State court shall be wholly null and void."

In other words, the procedure there outlined was precisely that which today is provided in Section 76 of Title 28, U. S. C. The only substantial difference is that the class of federal officers entitled to the benefits of the law has, by subsequent Acts of Congress, been *enlarged*.

Here was no central thought of affording any personal protection to any individual. The Union had been challenged. South Carolina had flung the gauntlet in the face of Andrew Jackson. And Andrew Jackson and the Federal Congress, as was their right under the *code duello*, selected the weapons with which the contest should be conducted—a contest involving the liberty and the property of no one man and no one or more Federal officer, but the very life of the Union. If resort be had to history to ascertain the meaning of this statute and the intention of Congress, either in enacting it or later in adding to those entitled to its benefits other classes of Federal officers, the vivid picture thus disclosed is far

from that conceived by the Circuit Court of Appeals for the Fifth Circuit.

By the Act of March 3, 1863 (12 Stat. 755), the right of removal was also accorded to other Federal officers, particularly military officers, but the procedure for removal was similar to that provided in the Judiciary Act of 1789, inasmuch as no necessity existed for the procedure described in the Act of 1833. This also was a war measure and was primarily designed for the preservation of the Union rather than the liberty and property of Federal officers. The class of persons entitled to the benefit of this act was *enlarged* by Section 50 of the Act of June 30, 1864 (13 Stat. 244).

By the Act of July 27, 1868 (15 Stat. 226), the right of removal was also extended to corporations, other than banks, organized under the laws of the United States, upon the usual condition of filing petition and bond in the State court. It is interesting to note, as indicating whether the purpose of this Act was personal or governmental, that it was a supplement to the Act of February 21, 1863 (12 Stat. 657), entitled "An Act to Allow the *United States* to Prosecute Appeals and Writs of Error Without Giving Security."

The Act of February 28, 1871 (16 Stat. 433), amended the Act of May 31, 1870 (16 Stat. 140) which had been passed in aid of the Fifteenth Amendment and was commonly known as one of the Civil Rights statutes.

The Act of 1871 further enlarged the class of people entitled to invoke the right of removal from the State Courts to the Circuit Courts, and, evidently in view of the conditions existing throughout the South, provided for the removal in the manner described in the Act of 1833, and in the manner today provided in the statute under consideration in this case. This was an Act de-

signed to carry into effect and to enforce the provisions of the Fifteenth Amendment.

Without undertaking to trace the details of these removal provisions through the Revised Statutes and through the Act of March 3, 1875 (18 Stat. 401), by which officers of Congress were given the right of removal; the Judicial Code of March 3, 1911, and the Act of 1916 by which the right of removal was extended to officers of the courts of the United States, it seems sufficient to say that from the Act of 1815 down to the present time the conditions and circumstances leading up to the passage of the various statutes referred to indicate that the primary design and purpose of Congress was to strengthen the arm of the government; to require that governmental issues should be tried and decided in governmental courts, and not to provide any personal protection to the officers of the government except as the safety of the individual soldier has reference to the safety of the army.

The members of Congress who voted for the adoption of the Act of 1916 may well be assumed to have known the purpose of the enactment of the Act of 1833. In 1916 half of the world was ablaze with war, spies and secret agents of foreign governments were scattered throughout this country. Some of them had already been detected. Those who were found would probably be dealt with by the courts of the United States. This government was even then upon the very brink of war. Large sections of this country and very large sections of some States were known to be greatly averse to any action which would distress or discommode the Central Powers. In the event of war, new laws would be required, new remedies devised; enemies and enemy property must be handled, perchance through new of-

ficers and agencies of the National courts not then known by name.

It was gravely important that the officers of the courts of the Union, not for themselves but for the Union, should be strengthened and given every support which could be extended to them in anticipation of the impending conflict. However, officially, this government was neutral. It would have been highly impolitic for any member of Congress, in considering this Act, or the bill which gave it birth, to assert that such was its purpose and its aim. Considering the delicacy of the international situation then existing, it may well have been that the committee which reported this bill and recommended that it be passed did, in fact, entertain motives for favoring its adoption which were not expressed in the debates and were not bared in the official report of the committee. Whatever may have been the motives of the committee or its chairman, there is every reason to believe that the members of the House and Senate who voted for its passage were not blind to the possibilities of the situation; recognized its real effect, understood that by the decisions of this Court which we have cited, the courts would give effect to the simple and natural language of the Act; and on those grounds voted for it.

When Congress passed the Act of March 3, 1875, by which the right of removal by summary process was given to officers of Congress, and when it passed the Act of August 23, 1916, further extending the benefits of the Act to officers of the United States courts, there stood in the statutes of the United States several entirely separate sections relating to the removal of causes. Cases removed under one of these (Section 71, Title 28, U. S. C.) require the filing of a petition and bond with the State court. Another (Section 76, Title 28, U. S. C.)

provided the summary process by petition to the Federal court without security. Are we to understand that the careful selection in each instance of the particular section to be amended is to be given no weight? On either occasion Congress could have done what the Circuit Court of Appeals for the Fifth Circuit says it intended to do by amending the section which it chose *not* to amend. Furthermore, it *could*, if it had desired, have provided that the benefits of the statute should extend not to all officers of the Federal courts, but only to marshals and their deputies and possemen; it *could* have provided that not *every* civil suit against those officers might be removed but only those in which the action was brought against the officer to hold him responsible in his own person or property. The fact remains that Congress did *not* amend the ordinary removal statute in either case; it did *not* limit the officers of Federal courts to a select class indicated by title; it did *not* limit the kind of suits against those officers which it declared to be subject to removal by summary process.

We invoke the history of the law and assert that its careful review will demonstrate our challenge that the decision in *Ruff v. Gay* is untenable.

These were evidently the considerations which induced this Court to hold, as it did, in the case of *State of Colorado v. Symes*, 286 U. S. 510, opinion by Mr. Justice Butler. This was an original proceeding for mandamus in the Supreme Court to be directed to the Judge of a District Court in Colorado to compel the remand of a case to the State court. The case in question was a murder indictment against a prohibition agent of the United States. During the course of its opinion the Court thus explained the purpose of the involved section of the code:

"The protection afforded by section 33 extends to prohibition agents. 27 U. S. C. Sec. 45 (27 U. S. C. A. Sec. 45). *The various acts of Congress constituting the section as it now stands were enacted to maintain the supremacy of the laws of the United States* by safeguarding officers and others acting under federal authority against peril of punishment for violation of state law or obstruction or embarrassment by reason of opposing policy on the part of those exerting or controlling state power. Tennessee v. Davis, 100 U. S. 257, 25 L. Ed. 648; Maryland v. Soper (No. 1), 270 U. S. 9, 32, 46 S. Ct. 185, 70 L. Ed. 449; Nashville v. Cooper, 6 Wall. 247, 253, 18 L. Ed. 851; Findley v. Satterfield, Fed. Cas. No. 4,792. It scarcely need be said that *such measures are to be liberally construed to give full effect to the purposes for which they were enacted.*" (Italics ours.)

4—The Statute, as Amended in 1916, must be Interpreted in the Light of the Construction Previously Placed upon it by the Courts:

The Fifth Circuit Court of Appeals interprets the amendment of 1916 as authorizing removal of cases only in those instances where a personal judgment is sought against an officer of the court. This construction necessarily excludes all cases in which the purpose is to secure a judgment against the receiver or trustee as such. In aid of its interpretation, the court refers to the committee report accompanying the amendment in the House. It is true that this amendment makes it perfectly plain that suits against officers of the court, where the endeavor is to hold them personally liable by reason of their official acts, are removable. It can be readily shown by reference to the report, however, and to the history of the statute, that the amendment was intended

to relate not only to such personal suits, but to *all* suits and prosecutions against such officers.

The decision further states, or intimates, that the purpose of the amendment was to extend to officers of Federal courts the same protection which had previously been accorded to revenue officers. This is probably a fair statement of its purpose, and hence reference should be made to decisions of the courts in which the act with reference to revenue officers had been given practical application.

In considering these decisions, Section 842, Title 28, U. S. C., should be borne in mind. This section provides that when any recovery is had against an officer of the revenue for any act done by him, or for money exacted by him and paid into the treasury in performance of his official duty, and the court certifies that there was probable cause for his action, or that he acted under proper authority, no execution shall issue against the collector, but the amount so recovered shall be provided for and paid out of the proper appropriation, from the treasury. It has been held by this Court that suits against collectors of internal revenue are essentially personal in character. *Smietanka v. Indiana Steel Company*, 257 U. S. 1; *Sage v. United States*, 250 U. S. 33.

George Moore Ice Cream Company v. Rose, 289 U. S. 373, decided May 8, 1933, opinion of Mr. Justice Cardozo, apparently places this section of the statute in a different light. It is therein held that where the complaint shows upon its face that the tax had been duly assessed by the Commissioner of Internal Revenue, and that the collector was acting within the scope of his duties or under proper authority in making the collection, he is entitled *as a matter of right*, to a certificate

converting the suit against him to one against the Government; that in such circumstances his presence as a defendant is merely a remedial expedient for bringing the Government into the suit.

Turning now to the decisions dealing with revenue officers, attention is first directed to *Philadelphia v. Diehl,* 5 Wall. 720. Therein, plaintiff sued the defendant as a collector of internal revenue in an action of assumpsit, to recover back certain duties paid under protest. The suit was instituted in a State court and removed by certiorari into the Federal court under Section 3 of the Act of March 2, 1833. Speaking through Mr. Justice Clifford, this Court held that the clear implication of the Internal Revenue Act was that the judgment against a collector in such a case was in the nature of a recovery against the United States; yet the case was undeniably one which could be removed under the Act of 1833 as amended by the Act of 1866.

In *Tennessee v. Davis,* 100 U. S. 257, the defendant, a revenue officer, was indicted for murder in a State court in Tennessee. The cause was removed by certiorari into the Federal court. A motion was made to remand, and the judges being divided in opinion certified the questions to this Court. It was the contention of the State that the Act only embraced prosecutions in State courts *for offenses under the laws of the United States.* The Court condemned this construction, holding that the statute meant what it said, and that it authorized "the removal of any cause, when the acts of the defendant complained of were done, or claimed to have been done, in the discharge of his duty as a Federal officer." In that case, therefore, the Court refused to

limit or narrow the application of the statute to less than the full area of its terms.

United States v. Lee, 106 U. S. 196, was an action of ejectment originally commenced in the Circuit Court for the County of Alexandria, Virginia. As soon as the declaration was filed, the case was removed into the Circuit Court by certiorari. The case was carried to the Supreme Court by writ of error. The property involved was sold at a tax sale by tax commissioners appointed under the Act of June 7, 1862, for the collection of taxes in insurrectionary districts. The exact status, or title, of the defendants Coffman and Strong is not entirely clear, but apparently they were tax commissioners who bought the land in for the United States. This is indicated by the following excerpts, the first from the opinion of the Court, and the second from the dissenting opinion of Mr. Justice Gray:

> "The title relied on by defendants was a tax sale certificate made by the commissioners appointed under the Act of Congress of June 7, 1862 (12 Stat. at L. 422), 'for the collection of direct taxes in the insurrectionary districts within the United States,' as amended by the Act of February 6, 1863 (12 Stat. at L. 640). At this sale, the land was bid in by said Commissioners for the United States, and a certificate of that fact was given by these commissioners and introduced on the trial as evidence by defendants."

> "These facts were made to appear at three stages of the case:

> "First. They were stated in a petition filed by Kaufman and Strong in the State court, for the removal of the case into the Circuit Court of the United States, under section 643 of the Revised

> Statutes, on the ground that the defendants were officers of the United States, and holding the land by title derived from officers of the United States, acting under a revenue law of the United States, the validity of which was affected. That petition was granted and the case removed accordingly."

At all events, the defendants were holding the property as officers of the United States and removed the case into the Federal court on the ground above stated. It was their position during the trial of the cause that they could not be divested of possession of the property because they held it as officers of the United States. The Court overruled this proposition, and in so doing made the following broad, clear statement which has a bearon our proposition:

> "If it be said, that the proposition here established may subject the property, the officers of the United States, and the performance of their indispensable functions, to hostile proceedings in the state courts, the answer is, that no case can arise in a state court, where the interests, the property, the rights or the authority of the Federal Government may come in question, which cannot be removed into a court of the United States under existing laws. In all cases, therefore, where such questions can arise, they are to be decided, at the option of the parties representing the United States, in courts which are the creation of the Federal Government.
>
> "The slightest consideration of the nature, the character, the organization and the powers of these courts will dispel any fear of serious injury to the Government, at their hands."

The defendants in the *Lee* case claimed no personal interest in the Arlington estate. They stood to suffer no

personal loss, in person or property, if cast in the suit. Yet the case was recognized as one which they were clearly entitled to remove on account of their official interest and character.

Thus, in one of the most notable decisions ever handed down by this Court, the statute now involved was construed as we contend it should be.

Cleveland, etc., Railroad Company v. McClung, 119 U. S. 454, was a suit by the railroad company against McClung to recover freight charges on certain dutiable goods that had been transported by the railroad company and turned over to McClung or his deputy, as collector of customs at Cincinnati. Such procedure was authorized by an Act of Congress. On the goods in question, the freight charges were paid to McClung or his deputy, by the consignees, and the goods were delivered by him to the consignees. The charges were never paid to the company by McClung. The railroad company sued in the State court to recover these charges and by certiorari the case was removed into the Circuit Court. A motion to remand was filed and denied. Judgment was rendered for defendant and the railroad company appealed. On the removal question, the Court said:

> "The removal was under section 643 of the Revised Statutes, which provides, among other things, for the removal of 'a civil suit * * * commenced in any court of a State against an officer appointed under or acting by authority of any revenue law of the United States, * * * on account of any act done under color of his office.' This is a suit against a collector of customs, an officer appointed under the revenue laws of the United States, for an act alleged to have been done by him in the delivery of dutiable goods placed in his hands by virtue of his office

subject to a carrier's lien. His liability, if any there is, grows out of his official duty to keep the goods and deliver them to the consignees thereof when the import duties are paid and the carrier's lien discharged. The allegation is that the collector, instead of notifying the carrier, as the law required, delivered the goods to the consignees on receiving himself the moneys due for the carrier's charges. This suit is for the money so received. Clearly, then, according to the allegations of the petition, the suit is for an act done by the collector under color of his office. This is not seriously denied; but the claim is that—as the defendant insists, and the court below has decided, that it was not the official duty of the collector to collect the carrier's money and, therefore, that he is not liable for the acts of his deputy in that behalf—the suit is really one that could not be removed. But the petition alleges an act done by the collector under color of his office, and seeks a recovery on that account. Such a suit is removable; and certainly the right to a removal is not taken away because the collector says in his defense that the act charged was not in fact done. If done by him, it was done under color of his office. The thing to be tried is whether it was done."

In *Downes v. Bidwell,* 182 U. S. 244, an action was begun in the Federal court against the collector of the Port of New York to recover back duties which had been paid on goods imported from Porto Rico. The opinion, by Mr. Justice Brown, dealt primarily with whether the Island of Porto Rico, by the treaty of cession, became a part of the United States, but a jurisdictional question was raised and the Court referred to the involved section of the code, stating that it, together with the section of the statute giving Circuit Courts jurisdic-

tion over all suits arising under any act providing for revenue from imports or tonnage, "are evidently intended to include all actions against customs officers acting under color of their office."

Dennistoun v. Draper, 7 Fed. Cases 488, Case No. 3804, 5 Blatchf. 336, was an action of replevin originally brought in a State court of New York to recover the possession of certain cotton. The case was removed into the Federal court by certiorari under the Act of March 2, 1833. The defendant was an officer under the revenue laws of the United States, and alleged in his petition for removal that he held the property by virtue of his office. The opinion, handed down in 1866, dealt with a motion to remand. This motion raised certain fact questions. The court held that the proper procedure was to carry these questions along with the case and dispose of them when it was tried. During the course of the opinion, it was said:

> "I agree, that, if the petition and affidavit, with the certificate of counsel, failed to bring the cause within the act of congress providing for the removal, it would be the duty of the court, on motion, to remand it; and such order has also not unfrequently been entered in cases where it appeared clearly, by the admission of the parties or otherwise, that they were not within the act of removal. But, in cases where the proceedings are in conformity with the act, removal is imperative, both upon the state and the circuit court; and, if the facts are seriously contested, it must be done in a formal manner, by pleadings and proofs, in the latter court. The question of jurisdiction belongs to the federal court, and must be heard and determined there. The statute is *peremptory*, that 'the cause shall thereupon be entered on the docket of said court,

and shall be thereafter proceeded in as a cause originally commenced in that court,' and 'shall be deemed and taken to be moved to the said circuit court, and any further proceedings, trial or judgment therein, in the state court, shall be wholly null and void' " (Italics ours).

Wood v. Matthews, 30 Fed. Cases 465, No. 17, 955, 2 Blatchf. 370, decided in 1852, was an action of trespass for taking and detaining a certain horse originally instituted against an internal revenue officer in a State court of Vermont. It was removed into a Federal court by writ of habeas corpus *cum causa* under the Act of March 2, 1833. The decision was on a motion to dismiss for lack of jurisdiction. The court held that since the proceedings in removing the cause appeared to be in all respects in conformity with the Act of Congress, the case was regularly in court, and the motion to dismiss was overruled.

In *Van Zandt v. Maxwell,* 28 Fed. Cases 1093, No. 16,884, 2 Blatchf. 421, plaintiff sued in a State Court in New York to recover part of the proceeds of merchandise which had been imported and condemned for a breach of the revenue laws. The defendant was collector of the Port of New York and removed the case by certiorari into the Federal court. A motion to remand was filed and the opinion, handed down in 1852 by Judge Betts and concurred in by Justice Nelson, dealt with the motion to remand. The court held that the acts of the defendant, which were the foundation of the suit, were performed by him in his *official character alone;* that he was acting under the law in determining the amount receivable, and in distributing the same; that the Act of March 2, 1833, gave official character to

the acts of such an officer done by him under color of the revenue laws, and even to those done by him under a claim of right derived from these laws; that his official relation did not end when the proceeds were placed in his hands, but that he was bound to dispose of them in a particular manner; that the fund was placed under his control in his official character; that the argument of plaintiff that he was entitled to have the cause remanded because the purpose of the suit was to charge defendant as a wrongdoer, was unsound since such a construction would nullify the Act of 1833, because in every case of prosecution against such a collector the purpose was to charge him with a personal liability for acts asserted to have been done wrongfully and without authority of law; that the purpose of the Act of 1833 was to place the jurisdiction over those questions between revenue officers and individuals in the Circuit Court of the United States, to the exclusion of State courts.

Fisk v. Union Pac. R. Co., 9 Fed. Cas. No. 4827, 6 Blatchford 362 (Circuit Court, New York, 1869), was instituted in the Supreme Court of New York and removed under the Act of July 27, 1868 (15 Stat. 226). On a motion to stay further proceedings in the State court, Judge Blatchford said:

> "It is quite apparent that the jurisdiction which congress intended to give, under this Act of 1833, where a suit or prosecution is commenced against any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States, or under color thereof, or for or on account of any right, authority or title set up or claimed by such officer, or other person, under any such law of the United States, is to be such a

jurisdiction, that a plaintiff in a state court shall not be able to deprive such officer or other person, who is sued on account of an act done under the revenue laws, of the right to remove the suit into a court of the United States, under this statute, by joining with him in the same suit other defendants who are not sued on account of acts done under the revenue laws. Thus to deprive the federal court of jurisdiction of the case, would be to deprive the officer or person justifying under the revenue laws, of the power to have his rights adjudicated from the commencement by the federal court, and to compel him to follow the case through the state courts in all of its stages, and finally take it, under the 25th section of the judiciary act, to the supreme court of the United States. No such construction of this law has been admitted, so far as I am aware. The manifest intent of this statute, in saying that 'it shall be the duty of the said state court to stay all further proceedings in such cause, and the said suit, or prosecution, upon delivery of such process, or leaving the same, as aforesaid, shall be deemed and taken to be moved to the said circuit court, and any further proceedings, trial, or judgment therein in the state court, shall be wholly null and void,' is to remove the suit. The suit goes into the federal court, with all the parties to the suit. Every party to the suit is brought into the federal court when the suit is brought there, and the court, in obtaining jurisdiction of the suit, obtains jurisdiction over all the parties to it. It is plain that this must be the construction of the act of 1833, or it would be mere waste paper. Otherwise, a plaintiff would have it in his power to deprive an officer of the United States, who justified his acts under the revenue laws, from ever removing the cause into the federal court by joining with such officer, as a defendant, some other person, on other causes of action, no matter how incongruous or irrelevant.

"The same principle applies to the act of March 3, 1863."

And so, evidently, should the same principle apply to the Act of 1916.

Fischer v. Daudistal, 9 Fed. 145 (Circuit Court, Pennsylvania, 1881), involved a suit of foreign attachment, brought in a State court, the attachment writ directing the Sheriff to attach certain goods held by the Collector of the Port of Philadelphia. The collector was summoned as garnishee, and plaintiff tendered to him the duties on wine held by him. A rule was issued to the Collector to show cause why he should not receive the duties and surrender the goods. He then secured a writ of certiorari removing the case into the Federal court. A motion to remand was made and without opinion it was overruled by the court. The collector did not appear to have had any personal interest in the suit.

Gallatin v. Sherman, 77 Fed. 337 (Circuit Court, New York, 1896), was an action by a landlord to recover from a lessee possession of premises used as a bonded warehouse, the Collector of Internal Revenue and a United States store-keeper being made parties defendant. The cause was instituted in a State court, and removed by certiorari into the Federal court. A motion to remand was filed, and in response thereto the defendants asserted that the property was held by them under and by virtue of the revenue laws, that it was the policy of said legislation to have all questions affecting the revenue laws of the United States and the authority of revenue officers, determined in Federal courts, and not to leave them to be jeopardized in courts of another jurisdiction. The motion to remand was denied. Here again no personal interest is apparent.

Ward v. Congress Construction Co., 99 Fed. 598 (C. C. A., 7, 1900), involved an injunction decree restraining the Construction Company from proceeding with the construction of an addition to a post office on certain property. A State court in Illinois had issued an injunction running to certain individuals, restraining them from placing any buildings or structures on the ground involved. The Construction Company was not a party defendant in this case. Subsequently, on motion served upon the Construction Company, the injunction order was broadened so as to include it. It then obtained a writ of certiorari removing the cause into the Federal court, which held, on motion to remand, that the case was removable. The court asserted that the involved section of the statute had been liberally construed as, for manifest reasons, it should have been. In his concurring opinion, District Judge Seaman stated:

> "The tests are (1) that the secretary of the treasury, by whom the work was ordered, was an officer administering the revenue laws of the United States, acting 'under color of his office,' and not that the act in question related to 'the raising of revenue' * * *, and (2) that new proceedings were pending in a state court against such action, wherein hearing was open to such officer and his agents."

It appears, therefore, that over a period of many years prior to the passage of the Act of 1916 the courts had liberally construed the Act of 1833 and its amendments and supplements, as was held proper in *Colorado v. Symes*, 286 U. S. 510. They had held, in an unbroken line of decisions, that personal interest or personal liability, as distinguished from official interest, was *not* essential to the right of removal.

When we bear in mind that the only substantial change effected by the 1916 amendment was to add another class of officers to those already entitled to the benefits of the Act of 1833, leaving the statute otherwise substantially unchanged, the conclusion is inevitable that Congress intended that the same rights should thereafter be enjoyed by officers of Federal courts as had previously been affirmed by the courts to revenue collectors and the like. *Sessions v. Romadka*, 145 U. S. 29; *Dollar Savings Bank v. United States*, 19 Wall. 227.

5—The Reasons Given in Ruff v. Gay for the Interpretation There Placed on the Statute are Unsound:

(a) It is said that for fifty years the policy of Congress "has been to restrict, not to enlarge, Federal jurisdiction." The greatest extension of Federal jurisdiction ever to occur arose from efforts to enforce the Eighteenth Amendment. The liquor laws at least did not restrict that jurisdiction. The Act of March 3, 1875 (18 Stat. 401), by which officers of Congress were given the right to remove, did not restrict Federal jurisdiction. Except for Acts restricting the jurisdiction of this Court and Acts increasing the amount required to give the District Court jurisdiction in cases of Federal questions, diversity of citizenship and the like, the great tendency, as this Court well knows, has been toward the aggrandizement of the Federal Government and its courts at the expense of the States. By reference to the history of the statute (*supra*, 33), it will be observed that, with respect to *this particular section*, the *constant* policy of Congress has been to enlarge rather than restrict its scope.

(b) It is said that this attitude was particularly

manifested in regard to suits against receivers by the Act of March 3, 1887. That Act *did not restrict* the jurisdiction of the Federal courts in actions against their receivers. It merely *permitted* actions to be brought against such receivers in other courts, State or Federal, without leave of the appointing court. If such an action against a receiver is brought in a State court, the receiver, under Section 71, may remove it to the Federal court if a proper ground exist, such as a Federal question or diversity of citizenship.

(c) It is said that Section 76, Title 28, U. S. C., relates "entirely to the removal of suits and prosecutions against revenue officers and officers of the Congress * * * having no relation whatever to receivers, nor even generally to removals." Even a casual reading of that section will disclose that it is *not* limited solely to revenue officers and officers of Congress. Its benefits extend to persons acting under or by authority of revenue officers, and to persons holding title derived from such officers. In most instances, these persons would hold no Federal office of any kind. The object of extending the benefits of the statute to "persons holding title derived from such officers" was obviously governmental and not at all personal. Its plain purpose was to so secure the title to be acquired in sales made by officers of the government that the price offered and paid by the bidder would be larger. The same observation might have been made with equal force with respect to the Act of 1875 respecting officers of Congress, and to every other Act by which additional classes are added to a statute.

In Chapter 3, of Title 28, U. S. C., we find the following sections describing the character of cases which

may be removed from State to Federal courts: 71, 73, 74, 76 and 77. No *one* section describes *all* cases which may be removed. All relate to removals, but necessarily each is somewhat specific. As the statute, before amendment in 1916, already provided for removals by officers of the executive and legislative branches of the Government, it seems not inappropriate, and certainly not "bizarre and fanciful," that the same section should have been selected for amendment with respect to suits against officers of the judicial branch.

(d) Reference is made to "a secret breach in the removal laws." The Act of 1916 is Chapter 399 of the Public Laws passed at the First Session of the Sixty-fourth Congress. It amended Section 33 of the Judicial Code of March 3, 1911. It was as public and as far from secret as any other public law of Congress.

(e) It is said that this "secret breach" was "in entire reversal of the settled policy of restriction." We have adverted above to the alleged "policy of restriction." Furthermore, in *Sonnentheil v. Christian etc. Brewing Co.*, 172 U. S. 401, and other cases, this Court had long before held that a suit against a Federal officer, such as a marshal or a postmaster, for acts done in the performance of official duties, was one arising under the laws of the United States, and as such, if the requisite amount were involved, removable to the Federal courts. Consequently, an amendment which merely changed the procedure by which a marshal might remove such a case, and taking away the restrictions upon him with respect to the amount in controversy, and making his right apply in criminal as well as civil cases, can hardly be said to be "in entire reversal of the settled policy of restriction."

(f) It is said that this "secret breach * * * opens the flood gates of the jurisdiction to pour into Federal courts all suits against Federal receivers." If it was the intention of Congress to open the flood gates leading to courts established by Congress which, under the Constitution, has full power to restrict or enlarge their jurisdiction, those courts will not shrink from the performance of their official duties. They will meet the exigency and discharge their functions as they did when they were given police court jurisdiction. In some measure, at least, the bar may be depended upon to avoid the imposition of any unjust burden on the Federal courts. Many actions against receivers can be litigated by them with equal success and with less expense in the State courts. This Court knows that the bar has not taken unreasonable advantage of the provision giving the District Courts jurisdiction over suits involving any law regulating interstate commerce.

(g) For the guiding rule of statutory construction the Court goes back to the decision, in 1584, in *Heydon's Case*, 76 English Reports Full Reprint, 637. The applicable rule, binding on the courts of the United States, was much later announced and reaffirmed in 1932, through Mr. Justice Sutherland in *United States v. Shreveport G. & E. Co.*, 287 U. S. 77. With this rule the Court was entirely familiar, because it stated that "significance and effect must, if possible, be accorded to every word of the statute." As we have shown above (pp. 15-33) the Court failed to do this.

(h) It is said that " 'all the mischief and defect' " which the amendment was designed to cure "was the failure of the statute to extend to officers of the United States courts the privilege of removal which before only rev-

enue officers and persons acting for them, and for the Congress, had enjoyed." As shown above, officers of Federal courts already had a right of removal under the decisions of this Court. The statute could have had no purpose except to enlarge and extend and facilitate this existing right of removal. It was necessarily creative rather than restrictive. If Congress had not intended to include *all* officers of court, it could easily have named the particular officers intended, such as judges, clerks, marshals, deputies and possemen. When it said "*officers*," it did not mean "*some* officers." It did not mean to leave it to the courts to speculate on *what* officers were intended.

(i) The committee report, of which so much is made, said that the purpose of the amendment was "to extend the provisions of Section 33 uniformly to officers of the courts of the United States * * * *in all cases*, giving to them the same protection *in all cases* now given to officers acting under the revenue laws, and to officers of the Congress." If the statute is construed with this purpose in mind, in the light of the history of the statute and the previous decisions of the courts, it is impossible to arrive at the conclusion reached in *Ruff v. Gay*.

Bearing in mind the purpose stated in the committee report and the previous decisions of the courts, it can only be said that the author of the report, in declaring that "the proposed amendment does not extend *in any degree* the jurisdiction or the powers of the courts of the United States," to some extent failed to foresee, or may, deliberately, have failed to state, the result of giving effect to the purpose so clearly expressed. But an erroneous statement of the effect of a bill by one member of one committee, or by an entire committee, may not

control the meaning which the courts must attribute to the solemn language of the whole Congress.

(j) As we will show below (p. 76-9), the attempted distinction of *Barnette v. Bank*, 270 U. S. 438, was not well grounded.

The reasons, therefore, which were assigned for the decision in *Ruff v. Gay* do not support the holding.

POINT IV.

MANDAMUS IS THE APPROPRIATE REMEDY TO SECURE TO PETITIONERS THEIR RIGHT OF REMOVAL

Petitioners presented to the District Court, while in session, their petition for removal and certiorari, as amended (Petn. for Mand., p. 10). Counsel for the plaintiff in the suit presented a reply (Petn. for Mand., p. 10). The Court heard arguments, received briefs and took the matter under advisement on October 19, 1933 (Petn. for Mand., p. 12). At the time of submission, at the direction of the Court, the petition, supplemental petition and reply were delivered to and filed with the clerk, but he did not then or later endorse the same as having been filed with him (Petn. for Mand., p. 11).

On November 20, 1933, the Court returned to counsel for petitioners the original and supplemental petitions for removal, and the reply thereto with the following order or direction endorsed thereon and signed by the Judge, to-wit:

> "The foregoing Petition for Removal and Certiorari and Exhibits attached and referred to, shows that the suit sought to be removed to this Court is not a suit in which Plaintiff seeks to hold L. W. Baldwin and Guy A. Thompson, Trustees, responsible in their own person and/or property, but only in their representative capacity. It is, therefore, denied. See Ruff v. Gay, C. C. A. (5th), No. 7008, decided November 15, 1933." (Petn. for Mand., p. 12).

It is apparent that from this action of the Court, which was equivalent to a refusal to take jurisdiction, no appeal or writ of error lies to the Circuit Court of

Appeals under Section 128 of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936), and by the Act of April 3, 1926 (44 Stat. 233), the Act of February 28, 1927 (44 Stat. 1261), and the Act of April 11, 1928 (45 Stat. 422) (all of which will be understood to be included when reference is made to said Act of February 13, 1925). The refusal to take jurisdiction was not a final decision, nor was it an interlocutory order such as may be reviewed by the Circuit Court of Appeals under that section. Neither is it such an interlocutory order as may be reviewed by the Circuit Court of Appeals under Section 129 of the Judicial Code, as amended by said Act of February 13, 1925.

The order clearly may not be reviewed by this Court on appeal or error under Section 237 of the Judicial Code, as amended by said Act of February 13, 1925. That section deals solely with the review of final decisions in the highest court of the State.

Nor has this Court jurisdiction by appeal, error or otherwise under Section 238 of the Judicial Code, as amended by the Act of February 13, 1925. There being no method of review by appeal or error to the Circuit Court of Appeals, this Court can have no jurisdiction under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925.

In short, it is plain that a refusal of the District Court to take jurisdiction of the suit sought to be removed cannot be reviewed either by this Court, or by the Circuit Court of Appeals, on appeal, error or certiorari, and that the only method of correcting the error committed below is by a writ of mandamus which may be issued under Section 377 of Title 28, U. S. C., either by this Court or by the Circuit Court of Appeals. *Ex Parte United States,* 287 U. S. 241. In that case the Court said:

"Section 716 Rev. Stats. (Title 28, Section 377, U. S. C.) provides that this court and other federal courts 'shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.' As early as 1831 it was settled that this court had power to issue a mandamus directed to the federal Circuit Court commanding that court to sign a bill of exceptions, such action being in the nature of appellate jurisdiction. In re Crane, 5 Pet. 190, 193. * * * McClellan v. Carland, 217 U. S. 268, 280, 30 S. Ct. 501, 54 L. Ed. 762, laid down the general rule applicable both to this court and to the Circuit Courts of Appeals, that the power to issue the writ under R. S. Sec. 716 is not limited to cases where its issue is required in aid of a jurisdiction already obtained, but that 'where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below.'"

The Court referred to *Los Angeles Brush Mfg. Corp. v. James*, 272 U. S. 701, and said:

"In that case an application for mandamus was made to this court to compel a District Court to hear a patent case, instead of referring it to a master, in alleged violation of Equity Rules 46, 59 (28 U. S. C. A. Sec. 723)."

The writ applied for was issued.

In *Ex Parte Bradstreet*, 7 Pet. 634, this Court issued a writ of mandamus directed to a Federal District Court of New York requiring that a cause, which had been dismissed for lack of jurisdiction, be reinstated on the

docket, tried and decided according to law. Chief Justice Marshall, delivering the opinion, held that the District Court had jurisdiction and that it should be compelled to exercise it.

Ex Parte Parker, 120 U. S. 737, involved a petition for mandamus to the Supreme Court of the Territory of Washington. In the case involved, plaintiff had recovered judgment below and defendant had appealed. The case was docketed in the Supreme Court of the territory, and a motion to dismiss the appeal was filed and allowed. This Court granted a writ of mandamus, requiring the reinstatement of the appeal, saying:

> "The Supreme Court refused to hear the cause and to decide it upon it merits, because it considered that the cause was not lawfully before the court; that the parties were not in court for the purpose of an appeal. This presents a case for the exercise of the jurisdiction of this court in *mandamus* according to the principles and practice applicable thereto. That writ properly lies in cases where the inferior court refuses to take jurisdiction where by law it ought so to do, or where, having obtained jurisdiction in a cause, it refuses to proceed in the due exercise thereof; but it will not lie to correct alleged errors occurring in the exercise of its judicial discretion within its jurisdiction. As was said in Ex Parte Brown, 116 U. S. 401 (29:676) '*Mandamus* lies to compel a court to take jurisdiction in a proper case, but not to control its discretion while acting within its jurisdiction.'"

The same matter came again before this Court in *Ex Parte Parker,* 131 U. S. 221, involving another dismissal of an appeal. This Court held that the appeal

was not a matter which could be refused by the Court in its discretion; that "rights, under our system of law and procedure, do not rest in the discretionary authority of any officer, judicial or otherwise." The Court further said:

> "It is also objected that mandamus is not the proper remedy for the petitioner, under the decision in Ex Parte Brown, 116 U. S. 401 (29:676). There the supreme court of the Territory entertained jurisdiction of the cause which was brought before it by appeal, but dismissed it for want of due prosecution; that is to say, because errors had not been assigned in accordance with rules of practice applicable to the form of the action; and we held that the judgment could only be reviewed here on writ of error or appeal, as the case might be. In the case before us, the supreme court of the Territory dismissed the appeal because not properly taken, that is, because the cause had not been brought before it from the lower court. The distinction in the two cases is obvious: in the one, the court below had taken jurisdiction and acted; but in the present case it refused to take jurisdiction. The right of mandamus lies, as held in Ex Parte Parker, 120 U. S. 737 (30:818) where an inferior court refuses to take jurisdiction when by law it ought to do so, or where, having obtained jurisdiction, it refuses to proceed in its exercise. It does not lie to correct alleged errors in the exercise of its judicial discretion. Ex Parte Morgan, 114 U. S. 174 (29:135); Chateaugay Ore and Iron Co., Petitioner, 128 U. S. 544, 557."

Ex Parte Schollenberger, 96 U. S. 369, involved a petition for mandamus requiring the judges of the Circuit Court of the Eastern District of Pennsylvania to hear and determine certain suits brought in that court

against a number of insurance companies incorporated in other states. The Circuit Court refused to take jurisdiction because at the time the suits were filed, and thereafter, the insurance companies were not residents of nor to be found in the district. A State statute of Pennsylvania required, as a condition precedent to the right to do business in that State, that a foreign company consent to be "found" within the territory for the purpose of service of process in a suit. This Court held that service having been had on each of the insurance companies, the Circuit Court had jurisdiction of the case, and the writ of mandamus was accordingly granted.

Grossmayer, Petitioner, 177 U. S. 48, involved a petition for a writ of mandamus to the District Judge of the United States for the Eastern District of Texas, requiring him to enter judgment by default for petitioner in an action brought by him in that court. The court had declined to enter such a judgment, due to its conclusion that the service on defendant was insufficient. The court held that a writ of mandamus could not be used to perform the office of an appeal or a writ of error, and that hence a final judgment could not be reviewed by writ of mandamus, but that if the court, after sufficient service on defendant, had erroneously declined to take jurisdiction of the case, or to enter judgment therein, a writ of mandamus could issue to compel it to do so. It was further held, however, that the Circuit Court was correct in its conclusion that proper service had not been had and the writ of mandamus was accordingly denied.

The present situation is not essentially unlike those cases in which this Court has issued a writ to compel

the assembling of a three-judge court to hear and determine a controversy in which three judges are required. See *Ex Parte Metropolitan Water Co.*, 220 U. S. 539, *Ex Parte Northern Pacific Rd. Co.*, 280 U. S. 142.

We respectfully submit that a writ of mandamus is the appropriate remedy and the only remedy to secure to petitioners their right of removal under Section 76 of Title 28, U. S. C.

The writ applied for is not asked to control any discretion vested in the District Court or the Judge thereof. Under the statute, if the case be in law a removable case, as we have shown it is, and if the party seeking the removal has complied with the requirements of the statute, as the petitioners have, the District Court has no discretion under the statute. The statute makes it the *duty* of the District Court in such cases to take jurisdiction of the suit, to secure the record by the issuance and service of a writ of certiorari, and to proceed to hear and determine the case. As was said in *Dennistoun v. Draper*, 7 Fed. Cases, No. 3804, the statute is peremptory.

In *Colorado v. Symes*, 286 U. S. 510, Mr. Justice Butler, referring to the statute under which the removal was sought in this case, said:

> "The various acts of Congress constituting the section as it now stands were enacted to maintain the supremacy of the laws of the United States by safeguarding officers and others acting under federal authority against peril of punishment for violation of state law or obstruction or embarrassment by reason of opposing policy on the part of those exerting or controlling state power. Tennessee v. Davis, 100 U. S. 257, 25 L. Ed. 648; Maryland v. Soper (No. 1), 270 U. S. 9, 32, 46, S. Ct. 185, 70 L.

Ed. 449; Nashville v. Cooper, 6 Wall. 247, 253, 18 L. Ed. 851; Findley v. Satterfield, Fed. Cas. No. 4, 792. It scarcely need be said that such measures are to be liberally construed to give full effect to the purposes for which they were enacted."

Unless this Court shall take jurisdiction of the present controversy and grant the writ as prayed for, the statute cannot "be liberally construed to give full effect to the purposes" for which it was enacted.

POINT V.

THE RIGHT TO MANDAMUS IS NOT DEFEATED BY THE STATUTE CONCERNING THE FINALITY OF ORDERS REMANDING SUITS TO STATE COURTS

Section 71, Title 28, U. S. C., contains the following provision:

> "Whenever any cause shall be removed from any State court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed."

This relates only to orders remanding causes to State Courts. It does not in terms include a refusal of the District Court to accept a case and docket the same where procedural rules have been followed. The meaning of the words contained in the statute is plain. It cannot preclude the issuance of a writ of mandamus in the present case, unless the terms contained therein are given a meaning beyond their usual and common significance. Attention in this connection is directed to the authorities reviewed under Point III, with respect to the construction of statutes whose meaning is plain. (*Supra*, 15.)

A reading of the decisions of this Court on the above provision of the statute might, at first blush, indicate that the Court has given it a rather broad interpretation. Careful study of these cases will show, however, that they have gone no further than is fairly required by a literal reading of the section. It provides that when a

cause has been remanded "such remand shall be immediately carried into execution," and the courts carried out the intention of Congress as manifested in this section of the statute. Thus, in *Morey v. Lockhart* (1887), 123 U. S. 56, it was held that an order of the Circuit Court remanding a case to the State court could not be reviewed by appeal or writ of error. This, of course, is plain from the positive terms of the statute.

Three years later, the Court held that an order remanding a cause could not be reviewed by mandamus. *Ex Parte Pennsylvania Company,* 137 U. S. 451. In this case the Court held that its general power to issue writs of mandamus was unquestioned; that under its prior decisions a writ of mandamus would lie to compel a court to reinstate a case on its docket which had been improperly remanded to the State court, but that the matter was governed by statute, and that the recital therein that "such remand shall be immediately carried into execution" was sufficient to preclude the remedy of mandamus.

In a later decision, *Missouri Pacific Railroad Company v. Fitzgerald,* 160 U. S. 556, the Court decided that the action of a Federal Circuit Court in remanding a cause to a State court could not be reviewed by writ of error to the State court after the cause had been tried therein and appealed. These decisions have been followed in later cases. *Illinois Central Railroad Company v. Brown,* 156 U. S. 386; *McLaughlin Bros. v. Hallowell,* 228 U. S. 278; *Yankaus v. Feltenstein,* 244 U. S. 127; *Matter of Matthew Addy Steamship & Commerce Corp.,* 256 U. S. 417.

It will be observed from these decisions that *in each case,* the Court was called upon, by writ of error, appeal, or petition for mandamus, to review a decision of a

District or Circuit Court *remanding* a case to the State Court, *after* it had previously been removed to the Federal Court, and *under the literal terms of the statute* it has necessarily held that such orders could not be reviewed.

It is evident that a wholly different situation is here presented. Section 76, Title 28, U. S. C., sets out in explicit terms the procedural steps to be followed in order to *secure* a removal thereunder. These steps have here been followed. The statute confers a positive right when the petition for removal complies with the requirements of the statute. The District Court is not vested with discretion to receive it; the terms of the statute are mandatory. It provides that "the cause *shall* thereupon be entered on the docket of the District Court and *shall* proceed as a cause originally commenced in that court." It further provides that the clerk of the District Court *shall* issue a writ of certiorari to the State court requiring it to send to the District Court the record and the proceedings in the cause. The statute is peremptory. *Denniston v. Draper*, 7 Fed. Cases, Case 3804.

Section 76 provides not only for the issuance, but also for the *service* of the proper writ (certiorari, habeas corpus, etc.) for bringing the case into the District Court and it then declares that "upon *delivery of such process*" the suit "shall be held to be removed to the district court, and any further proceedings, trial, or judgment therein in the State court shall be void." In other words, under the clear terms of the statute, the State court continues to have jurisdiction of the suit, and power to proceed therein, until it is *served* with process issued out of the Federal court. And the suit is not to "be held to be removed to the District Court" *until* the process of the Federal court has been served.

Turning now to the provision quoted from Section 71, it will be observed that there are certain indispensable prerequisites to the effect of finality given by that section to an order remanding a cause. First, the cause must have been "removed from any State court into any District court of the United States." Second, the District court shall have *decided* "that the cause was improperly *removed*." Third, the District court must have *ordered* that the cause "be remanded to the State court *from whence it came*." *All three* of these prerequisites must coincide, under the simple language of the statute, before the order remanding the cause shall be treated as final and not subject to review.

In this case, *none of these prerequisites is present.* The cause has not been removed to the District court, because there has been neither Federal court process, nor service thereof. There having been no removal, the District court could not have decided that the cause was *improperly* removed. Neither did the District court "order the same to be remanded to the State court from whence it came." The order signed by Judge Kennerly on November 20, 1933, simply "denied" the petition for removal and certiorari.

It is apparent, therefore, that the statute relating to the finality to be attributed to orders remanding causes to State courts has no application whatever to the situation presented by this petition. It does not touch the case, top, side or bottom.

The history of the statute supports this interpretation. Prior to 1875 appeal or writ of error from an order remanding a cause to a State court would not lie, because such an order was not a final judgment. Mandamus was the proper remedy. See *Chicago & Alton R. Co. v. Wiswall,* 90 U. S. 507. The Act of March 3,

1875 (18 Stat. 470) contained a provision which permitted an appeal or writ of error from an order remanding a cause. Still later, by the Act of March 3, 1887 (24 Stat. 553), the provision above quoted and now contained in Section 71, was placed in the statute. The statute of which this provision forms a part was offered as H. B. 2441. When the measure reached the Senate certain amendments were inserted, including this provision. Sections 3 and 5 were also added by the Senate. These read:

> "Sec. 3. That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice."
>
> "Sec. 5. That nothing in this act shall be held, deemed, or construed to repeal or affect any jurisdiction or right mentioned either in sections 641, or in 642, or in 643, or in 722 or in title 24 of the Revised Statutes of the United States, or mentioned in Section 8 of the act of Congress of which this act is an amendment, or in the act of Congress approved March 1, 1875, entitled 'An Act to protect all citizens in their civil and legal rights.'" (Congressional Record, Second Session, 49th Congress, pp. 2542-3.)

Each of these amendments was apparently adopted without discussion. Section 5 of the act quoted above makes it perfectly plain that it was not the intention of Congress to add to or detract from rights enjoyed under

Section 76, Title 28 of the Code, for reference is expressly made in this saving clause to Section 643 of the Revised Statutes, which is the same, with certain amendments, as the present provision of Section 76 of the Code.

This court has often held that it possesses unquestioned power to control by mandamus the action of lower Federal courts in refusing to docket and hear causes over which they have jurisdiction.

That power is not affected, in even the slightest degree, by the quoted provision of Section 71. It can only apply to a case which has been removed. This case has *not* been removed.

POINT VI.

THIS COURT SHOULD TAKE JURISDICTION OF THE PRESENT CONTROVERSY

That this Court *can* assume jurisdiction of the present controversy, and *can*, in its discretion, issue its writ of mandamus, as prayed for, seems clear. *Ex Parte Parker*, 120 U. S. 737, *Ex Parte United States*, 242 U. S. 27, *Ex Parte United States*, 287 U. S. 241, Title 28, Section 377, U. S. C. In the case last cited the Court said:

> "McClellan v. Carland, 217 U. S. 268, 280, laid down the general rule applicable both to this Court and to the Circuit Court of Appeals, that the power to issue the writ under R. S. Section 716 (Title 28, Section 377, U. S. C.) is not limited to cases where its issue is required in aid of a jurisdiction already obtained, but that 'where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below.'"

If the suit instituted in the State court and involved in the present controversy is removable, as petitioners contend it is, it is clearly one which the Circuit Court of Appeals may review on appeal under Section 128 (a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936); and is one which this Court, under Section 240 (a) of the Judicial Code, as amended by the same act of February 13, 1925, may review by certiorari. This brings the matter directly within the scope of the further statement contained in the opinion just quoted from:

> "We prefer, however, to put our determination (of the power to issue the writ of mandamus to a

District Court) upon the broader ground that, even if the appellate jurisdiction of this court could not in any view be immediately and directly invoked, the issue of the writ may rest upon the ultimate power which we have to review the case itself by certiorari to the Circuit Court of Appeals, in which such immediate and direct appellate jurisdiction is lodged."

Bearing in mind that the power to issue the writ here applied for is reposed by the statute (Title 28, Section 377, U. S. C.) in the Circuit Courts of Appeals as well as in this Court, and that this Court, therefore, has jurisdiction concurrent with the Circuit Court of Appeals for the Fifth Circuit to issue the writ here sought, we address ourselves to the question whether this Court should take jurisdiction, or should refuse the writ without prejudice to the right of petitioners to apply to the Circuit Court of Appeals.

1. In view of the recent decision of the Circuit Court of Appeals for the Fifth Circuit in *Ruff v. Gay, supra*, it seems not unreasonable to assume that the writ would be refused by that Court, and that petitioners would thereupon be relegated to a petition to this Court for a writ of certiorari to review the decision of the Circuit Court of Appeals. This Court plainly has jurisdiction in the first instance. In either case the application is addressed to the discretion of this Court. It certainly will not require petitioners to make to the Circuit Court of Appeals an application which is probably foredoomed to be fruitless, and only permit them to come to this Court after their application to the Circuit Court of Appeals has been denied. This Court abhors circuity of action.

2. By paragraph 5 (b) of the 38th Rule of this Court,

a conflict of decisions between different Circuit Courts of Appeals is recognized as one of the grounds upon which this Court should exercise its discretion, on certiorari, and assume jurisdiction of a controversy. The decision in the Fifth Circuit in *Ruff v. Gay, supra,* is squarely in conflict, not only with the decision in the Eighth Circuit in *Newell v. Byram,* 26 Fed. (2d) 200, but also is in conflict with the decision of this Court in *Barnette v. Bank,* 270 U. S. 438.

As we read the opinions in that case, the division between the members of the Court was not caused by any diversity of opinion respecting the removability of the suit; but rested on the propriety of indulging the presumption, in the absence of a full record, that the removal had been rightly taken under the statute here in question.

The facts in the case at bar are almost identical with those which the Court there considered. Here, as there, the suit in the State court was for cancellation of a deed to land, held in his official capacity, by a receiver in that case and by bankruptcy trustees in this. In that case damages also were sought to be recovered from the receiver. Here, damages are prayed for against all petitioners, including the trustees in their official capacity. Based on the citation from *McNulta v. Lockridge,* 141 U. S. 327, contained in the opinion in *Ruff v. Gay,* both of these—

> "are in law, actions against the receivership, or the funds in the hands of the receiver, and his contracts, misfeasances, negligences and liabilities are official and not personal, and judgments against him as receiver are payable only from the funds in his hands."

Otherwise stated, both suits aimed at the property held

by the court's agent; both were strictly official and impersonal; *except* that in this case, *as to the corporate petitioners, the suit is personal as well as official,* since *they* are sought to be charged in both capacities.

Yet in the *Barnette* case (at p. 441), Mr. Justice Stone, speaking for the majority, declared:

> "Such a suit *was removable* under Sec. 28 of the Judicial Code as supplemented by the amendment of Sec. 33 by the Act of August 23, 1916 * * * The receiver was acting in virtue of authority conferred on him as officer of the Alaska court" (Italics ours).

And indeed, Mr. Justice Brandeis, in the dissent concurred in by Mr. Justice Sanford, did not say—clearly he did not mean to say—that the cause was *not removable* under the Act of 1916. He said:

> "Jurisdiction could not be sustained under Sec. 33, Judicial Code, as amended by the Act of August 23, 1916 * * * as a civil suit against 'an officer of the courts of the United States * * *' because there is nothing to show that removal was sought upon this ground, or that the requirements of the statute were complied with * * * or that there was 'a causal connection between what the officer has done' and his asserted official authority."

Implicit in that statement is the belief that if the removal had been sought upon that ground, and the requirements of the statute complied with, and the requisite causal connection disclosed, the case *was* removable under the statute cited.

As shown in the opening paragraph, the dissent went on the theory that, even conceding the removability of

the case, the Court had no right to presume the facts on which its jurisdiction depended.

We fail to see how it can be maintained, as said in *Ruff v. Gay*, that "the holding of the majority opinion * * * was * * * a purely suppositious one, and therefore not binding as a precedent." In his dissent, Mr. Justice Brandeis carefully pointed out that—

> "'On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first of this Court, and then of the court from which the record comes. *This question the Court is bound to ask and answer for itself*, even when not otherwise suggested, and without respect to the relation of the parties to it'" (Citing cases, Italics ours).

It was that precise question of jurisdiction which the Court, in the *Barnette* case did "ask and answer for itself, even when not otherwise suggested."

Being essential to the jurisdiction of the Court, the answer to the question was indispensable to the decision of the case. The record showed that the case *could* have been removed under the statute with which we are concerned here. The majority *presumed* that it had been. It held definitely that *such a case is removable*. On that holding we plant ourselves. It was made and it was right.

3. The papers attached to this petition for mandamus show clearly the anomalous position in which the trustee petitioners are placed by this conflict of decision. They are shown to be trustees for the Missouri Pacific Railroad, which has its principal operating office and at least a portion of its railroad in the Eighth Circuit (Petn. for Mand., pp. 28, 29). In that Circuit, under the decision in *Newell v. Byram*, the trustee petitioners enjoy

the right of removal sought in the present instance. They are also trustees for certain railroads in Louisiana and Texas, situated in the Fifth Circuit (Petn. for Mand., p. 38). In that Circuit the decision in *Ruff v. Gay* denies them the right of removal.

The same trustees, appointed by a single District Court, in a single proceeding instituted under Section 77 of the National Bankruptcy Act, are freely conceded the right to remove in some States of the Union, yet in other States that right is denied them. This egregious situation is not brought about by conflicting decisions of courts of the several States; but grows out of a conflict of decision between Courts of the Federal Government, and an apparent failure, in at least one instance, to recognize the binding effect of the decisions of this Court.

4. Paragraph 5 (b) of the 38th Rule of this Court indicates other grounds upon which this Court may well take jurisdiction of the present controversy. It is believed that in *Ruff v. Gay* the Circuit Court of Appeals for the Fifth Circuit "has decided an important question of general law in a way probably untenable or in conflict with the weight of authority" and "has decided a federal question in a way probably in conflict with applicable decisions of this Court."

The question of the right to remove such suits is now an especially important question of general law, because of the recent amendment to the Bankruptcy Act providing for the reorganization of railroads (47 Stat. C. 204). The Congress, by the Act of March 3, 1933, has clearly shown its intention to throw about faltering railroads the protecting mantle of the Federal Courts. Whether, in their official litigation, concerning the settlement and administration of those great estates, trustees appointed

under that Act may resort to the Courts of the Nation is certainly an important question.

In the present case it is doubtful whether the suit can be removed on the ground of diversity of citizenship. Certainly, that cannot be done unless the controversy against the trustee petitioners is separable from the controversy between the plaintiff and the other defendants in the suit. That is by no means certain.

In *Ex Parte United States*, 287 U. S. 241, this Court said:

> "The rule deducible from the later decisions and which we now affirm, is that this court has full power in its discretion to issue a writ of mandamus to a federal District Court, although the case be one in respect of which direct appellate jurisdiction is vested in the Circuit Court of Appeals—this court having ultimate discretionary jurisdiction by certiorari—but that such power will be exercised only where a question of public importance is involved, or where the question is of such a nature that it is peculiarly appropriate that such action by this court should be taken."

In the present instance we appeal to this Court for an exercise of that discretion. In support of that appeal we assert not only that the matter involves a question of public importance but also that the matter arises in such a way and is of such a nature "that it is peculiarly appropriate that such action by this Court should be taken."

In the case just cited, involving a writ of mandamus to compel the issuance of a bench warrant for the arrest of a person indicted by a grand jury, the application might well have been made to the Circuit Court of Ap-

peals. From the opinion, at least, it does not appear that there was reason to apprehend that the Circuit Court of Appeals would have refused such an application. In the present case, without indicating even the slightest disrespect for the Judges who participated in the decision in *Ruff v. Gay*, there is ample reason to believe that if the present petition should be addressed to them, the relief sought would be refused.

To avoid unnecessary delay and circuity of action, we respectfully appeal to this Court to take jurisdiction and issue the writ.

Petitioners therefore ask that they be granted the relief sought.

Respectfully submitted,

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Houston, Texas.
December 4, 1933.

APPENDIX

STATE CONSTITUTIONAL AND STATUTORY PROVISIONS CITED

Constitution of Texas, Article V, Section 8:

"Sec. 8. The district court shall have original jurisdiction in all criminal cases of the grade of felony; in all suits in behalf of the state to recover penalties, forfeitures and escheats; of all cases of divorce; of all misdemeanors involving official misconduct; of all suits to recover damages for slander or defamation of character; of all suits for trial of title to land and for the enforcement of liens thereon; of all suits for the trial of the right of property levied upon by virtue of any writ of execution, sequestration or attachment, when the property levied on shall be equal to or exceed in value five hundred dollars; of all suits, complaints or pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at or amount to five hundred dollars, exclusive of interest; of contested elections; and said court, and the judges thereof, shall have power to issue writs of habeas corpus, mandamus, injunction, and certiorari, and all writs necessary to enforce their jurisdiction. The district court shall have appellate jurisdiction and general control in probate matters over the county court established in each county, for appointing guardians, granting letters testamentary and of administration, probating wills, for settling the accounts of executors, administrators, and guardians, and for the transaction of all business appertaining to estates; and original jurisdiction and general control over executors, administrators, guardians and minors, under such regulations as may be prescribed by law. The district court shall have appellate jurisdiction and general supervisory control over the county commissioners' court, with such exceptions and under

such regulations as may be prescribed by law; and shall have general original jurisdiction over all causes of action whatever for which a remedy or jurisdiction is not provided by law or this constitution, and such other jurisdiction, original and appellate, as may be provided by law."

Revised Civil Statutes of Texas, 1925, Article 1971:

"Article 1971: Civil suits in the district and county courts shall be commenced by petition filed in the office of the clerk."

Texas Code of Criminal Procedure, Article 504:

"Article 504: The primary pleading in a criminal action on the part of the State is the indictment or information."